Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

TITAN SPORTS, INC., D/B/A
THE WORLD WRESTLING FEDERATION,
D/B/A THE WWF, A DELAWARE CORPORATION,

Petitioner,

v.

JESSE VENTURA, D/B/A JESSE "THE BODY"
VENTURA, A/K/A JAMES G. JANOS,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent obtained a trial award in a diversity case for nearly a million dollars on a *quantum meruit* claim. On appeal, Respondent admitted at oral argument that this claim was not based on existing state law. The appellate court nonetheless sustained the award by announcing *sua sponte* the existence of a heretofore unrecognized state right of publicity that had not been tried below. Although the appellate court acknowledged that Section 301 of the Copyright Act prohibited the new right, it held that Petitioner had somehow waived this argument by failing to anticipate the court's *sua sponte* decision. The questions presented are:

(1) Whether a federal appellate court conducting a predictive law analysis under *Erie* is free to create *sua sponte* a heretofore unannounced state right that is acknowledged by the court to be prohibited by federal law, in this case Section 301 of the Copyright Act.

(2) Whether it is appropriate for this Court to exercise its supervisory powers when a federal appellate court creates *sua sponte* a previously non-existent state claim to sustain an award rendered on other grounds when the newly announced state right: (a) was dismissed prior to trial on both factual and legal grounds; (b) was not preserved for appeal by Respondent; and (c) is prohibited by the provisions of Section 301 of the Copyright Act.

PARTIES TO THE PROCEEDINGS

Petitioner Titan Sports, Inc. ("Titan") is a Delaware corporation with its principal place of business in Connecticut. Titan does business under the names of The World Wrestling Federation and the WWF. Respondent Jesse Ventura is an individual who has done business under the name of Jesse "The Body" Ventura and is otherwise known as James G. Janos.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, Titan Sports, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on September 11, 1995.

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Eighth Circuit (A1) is reported at 65 F.3d 725 (CA8 1995). The order of the United States Court of Appeals for the Eighth Circuit denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc (D1) is not reported. The relevant opinions of the United States District Court for the District of Minnesota (B1, C1, E1) are also not reported.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit denied the Petition for Rehearing and Suggestion for Rehearing En Banc in this case on October 26, 1995 (D1). The jurisdiction of this Court to review the decision of the United States Court of Appeals for the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The provisions of the Copyright Act involved are 17 U.S.C. §§ 106 and 301(a). These provisions are set forth in the Appendix (H1).

STATEMENT OF THE CASE

Respondent Jesse Ventura is a Minnesota resident who formerly performed as a color commentator at various televised professional wrestling events promoted, produced, financed and sponsored by the Petitioner under the tradenames of the World Wrestling Federation or the WWF. Through its licensee, Petitioner sold videocassettes to the public of their televised WWF performances. From 1985 through 1990, pursuant to a series of agreements, Petitioner paid hundreds of thousand of dollars to Respondent for a few days work each year as a WWF commentator. This case involves Respondent's attempt to obtain nearly a million more dollars from Petitioner under state law theories because portions of his color commentary were included in some of the videocassettes of WWF performances sold to the public.

From 1985 until the fall of 1987, Respondent's color commentating services were rendered pursuant to oral contracts he made with Vincent K. McMahon, the owner of Petitioner. Respondent knew when he began such work in 1985 that Petitioner was selling videocassettes of WWF events, but he never asked for, nor was promised, royalties as part of his compensation for his services. It is

undisputed that Petitioner paid Respondent all the compensation it ever agreed to pay him for the services rendered during this initial phase of his career.

From the fall of 1987 to August 1990, Respondent's services were rendered pursuant to contracts negotiated for him by a Hollywood agent, Barry Bloom. Although his agent mentioned royalties at times during the negotiation of these contracts, Respondent ultimately agreed specifically to lump sum compensation and that he would not receive any royalties for the sale of videocassettes.[1] It is also undisputed that Petitioner paid Respondent every penny it ever agreed to pay him during this latter phase of his career.

In December 1991, Respondent filed a three count complaint in Minnesota state court seeking royalties for the use of his performances on videocassettes of WWF events. One count alleged that Petitioner had misappropriated Respondent's so-called "publicity rights" by including his performances on the videocassettes without his consent. Another count alleged that Respondent did not know that Petitioner was licensing the sale of videocassettes and that the use of his performances without his consent was somehow a fraud. The third count, and the only count not involving consent issues, alleged that Petitioner was supposedly on notice that Respondent expected to receive such royalties and therefore Minnesota *quantum meruit* law could now provide them.

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[1] The decision of the Eighth Circuit Court of Appeals refers to these two periods as the "pre-Bloom" period and the "post-Bloom period," and that terminology is continued herein.

Petitioner removed the case to the United States District Court for the District of Minnesota on the basis of diversity. Prior to trial, the district court precluded all reliance on the publicity rights claim. In its original ruling on that claim, the trial court held that Minnesota did not recognize a claim for misappropriation of publicity rights. (B4). On reconsideration, the trial court reaffirmed its ruling that Minnesota did not recognize a cause of action for misappropriation of publicity rights, and expanded its reasoning by finding that such a claim would not be available to Respondent in any event because he had consented to Petitioner's commercial exploitation of his name and likeness on the videocassettes. (E4). As a result, the trial court issued *limine* rulings precluding evidence relevant to that claim at trial.

Prior to trial, the district court also limited Respondent's presentation of an unplead fraud claim. Respondent attempted to modify his plead fraud claim from one that alleged that he did not know about the videocassette sales to one that asserted that his agent had been mislead during contract negotiations in the post-Bloom period. The trial court similarly precluded Respondent from affirmatively presenting his unplead fraud claim, but indicated that evidence of the new unplead fraud claim would be admitted in order to rescind the contracts negotiated by Respondent's agent so that he might recover in *quantum meruit* as if no contracts existed. (B2-B3, B5). On the day of trial, and in order to convince the court not to permit Petitioner to point out to the jury in opening argument or trial the obvious inconsistencies in the plead and the unplead fraud claims, Respondent expressly abandoned his plead fraud claim that he did not know of

the videocassette exploitation and that Petitioner was using his performances without consent.

As a result of the court's determinations regarding the publicity right claim and Respondent's dismissal of the plead fraud claim, the only two counts of the complaint involving the issue of whether Respondent had consented to the videocassette exploitation were removed from the trial. The *quantum meruit* claim left for trial was that Petitioner supposedly knew that Respondent expected to receive videocassette royalties as part of his compensation agreements and that the details of this allegedly expected compensation could be established under Minnesota *quantum meruit* law. However, at trial, the evidence proved that Respondent had never even discussed royalties with Petitioner in the pre-Bloom period and that Respondent had specifically agreed that he would not receive royalties in the post-Bloom period. Respondent, therefore, revised his *quantum meruit* claim to contend that his services in the pre-Bloom era were rendered in the absence of a complete agreement because videocassette royalties had not been a specific subject of bargaining. For the post-Bloom era, Respondent introduced evidence of the unplead fraud claim consisting of statements made to Respondent's agent by Petitioner's negotiating counterpart about Petitioner's royalty practices. These statements allegedly tempered the agent's efforts to obtain royalties at the bargaining table, which Respondent argued should permit him to rescind the post-Bloom contracts. In turn, Respondent being permitted to rescind the fully performed contracts negotiated by his agent, was then permitted to recover in *quantum meruit* for the post-Bloom period on the same theory utilized

in the pre-Bloom era, *i.e.*, that his services were supposedly rendered in the absence of a complete agreement as to compensation.

Following a jury verdict in favor of Respondent, the trial court vacated the award and treated the jury verdict as advisory due to the court's belated determination that Respondent was not entitled to a jury trial. The trial court then entered its own findings of fact and conclusions of law based almost entirely on Respondent's proposed findings of fact and conclusions of law. The trial court's findings and conclusions were not, in any part, based on the recognition of any state law "publicity right." Instead, the trial court, relying on a single *quantum meruit* Minnesota case provided to it by Respondent, *Sagl v. Hirt*, 52 N.W.2d 721 (Minn. 1952), held that because there was no agreement addressing Respondent's right to videocassette royalties, he was now somehow entitled to recover them. (C21). Thereafter, the trial court entered a substantial judgment against Petitioner, including $801,333.06 for royalties on the sale of videocassettes. (C21, C31).

Petitioner appealed. Throughout the briefing preceding oral argument, Respondent continued to maintain that the award was based on existing Minnesota *quantum meruit* law presented at trial. Nowhere in his brief did Respondent advise the court that he was presenting a case of first impression. Respondent's brief did not argue that the trial verdict should be, or even could be, affirmed on grounds other than those tried. In other words, Respondent did not appeal the ruling that Minnesota did not recognize a publicity right; nor did he appeal the

district court's ruling that he consented to the videocassette exploitation and the consequent dismissal, in one case voluntary, of the only claims asserted that were voided by his consent.

At the outset of the Petitioner's oral argument before the United States Court of Appeals for the Eighth Circuit, Judge Magill, who eventually authored the majority decision of the panel, asked why Respondent's claim was not preempted by federal copyright law. Counsel for Petitioner responded that there would be a preemption issue *if* the publicity rights claim were in the case, but pointed out that Respondent had failed to raise the dismissal of that claim as error. (F3-F5). Petitioner then argued, as it had in its briefs, that the trial verdict could not, as a matter of law, be sustained on the *quantum meruit* theory that had been tried below and presented on appeal because all of Respondent's services were rendered pursuant to agreements as to his compensation, which the uncontested evidence showed were fully honored by Petitioner.

In Respondent's ensuing argument, made when Petitioner had no further right of reply, Respondent's counsel admitted for the first time in response to questioning by Judge Arnold that what he really sought was a right to control the reproduction of Petitioner's videocassettes, a right that Respondent conceded was unsupported by existing Minnesota *quantum meruit* law.

> THE COURT: So what your opponent said is wrong, namely, that this is the property of the producer and they can reproduce it and not pay anybody.

> MR. EIDSNESS: Well –
>
> THE COURT: Why is that wrong?
>
> MR. EIDSNESS: Why that's wrong, Your Honor, Judge Arnold, is that this is the services that Mr. Ventura is providing. He's providing these services and *he has a right to decide whether he wants his services to be reproduced on video tape for somebody else's rights.*
>
> THE COURT: I understand that's your theory. But, the problem that I have with it is it's simply an assertion. Show me a case that says, well, if nobody says anything about royalties, nobody is entitled to royalties, or, a case that says if no one says anything about royalties that you're entitled to *Quantum Meruit*. Where is the case?
>
> MR. EIDSNESS: Your Honor, I believe that I could clearly state *that is a case of first impression*. There is no case that says it is and there is no case that says it isn't.
>
> THE COURT: Oh, great.

(F5-F6) (emphasis added). This admission had not been made to the trial court, nor in any briefs filed with the Eighth Circuit. Respondent also failed to advise the court that the issue of his consent in both the pre-Bloom and post-Bloom periods had been (1) decided against him by an unappealed trial court ruling, and (2) thereafter removed from the case by his decision after jury selection to voluntarily dismiss his fraud claim asserting lack of consent.

In brief, contrary to all previous statements about the case, Respondent contended at oral argument that *quantum meruit* was an appropriate vehicle *not* to recover for

unpaid services which he had rendered, since he was paid in full for all his services, but to control the reproduction rights on videocassettes – a theory that Respondent readily admitted was unsupported by Minnesota law. These admissions meant that the trial verdict could not be sustained on the *quantum meruit* theory tried. However, the timing of the admissions, corresponding lack of such admissions in prior briefs, and the failure to disclose the dispositive pretrial ruling on consent, meant that the Eighth Circuit would have to decide a case of first impression without the benefit of briefs on the issue it had to decide – whether the Minnesota Supreme Court would, and constitutionally could, grant Respondent a state law right to control the reproduction of Petitioner's videocassettes. Likewise, the timing of the admissions meant the court would have to proceed without adversarial guidance as to the factual findings of the trial court on the consent issue that precluded such a claim. Simply put, the Eighth Circuit would have to do a predictive analysis of Minnesota law under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), without the benefit of briefing on a state law issue of first impression, the impact of federal copyright law on that issue, or any other adversarial guidance. Petitioner, who had no right to respond to this new contention at oral argument, promptly requested leave for the Eighth Circuit to consider a supplemental brief. The supplemental brief, filed on March 27, 1995, demonstrated that the state law right being sought was entirely different than the claim tried, had not been presented or briefed for the court, and was prohibited by federal copyright law.

On September 11, 1995, with Judge Arnold dissenting, a panel majority ruled *sua sponte* that the Supreme

Court of Minnesota would recognize the tort of misappropriation of publicity rights. Even though no litigant had asked it to do so, the Eighth Circuit used that untried claim to sustain the award. The panel majority specifically ruled that Respondent's claim

> may succeed *only* if Titan's rights to use Ventura's performances are limited so that Titan is not entitled to use the performance without Ventura's consent. We believe that Titan's rights are limited by Ventura's right to publicity.

(A8). Respondent's failure to appeal the trial court's two pre-trial rulings that Minnesota did not recognize a claim for misappropriation of publicity rights was not mentioned. Moreover, even though consent was made the linchpin of this newly announced cause of action, the panel similarly failed to mention that no appeal had been taken from the trial court's ruling that Respondent had consented to the videocassette exploitation or that Respondent voluntarily dismissed on the day of trial the fraud claim alleging lack of consent to videocassette sales. And although the panel majority indicated that it "was troubled by the *fact*" that the new cause of action it had now crafted and developed *sua sponte* was preempted by federal copyright law, it ruled, without any explanation, that Petitioner had somehow waived the preemption issue by not timely raising it on appeal.[2] (A10).

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[2] At the same time it announced its decision, the panel also denied Petitioner's request for leave to file the supplemental brief demonstrating that Respondent's new claim, first made at oral argument, was prohibited by federal copyright law.

In his dissent, Judge Arnold demonstrated that no "reliable data" indicated that Minnesota would recognize the publicity right claim since Minnesota had not adopted any of the torts collectively known as the invasion of privacy. (A26-A27). Moreover, Judge Arnold concluded that such a cause of action must be interpreted consistent with federal copyright law, which confirmed that Petitioner owed Respondent no royalties. (A30-A31).

Following the panel decision, Petitioner filed a motion for reconsideration that pointed out that: (1) the panel's *Erie* analysis, undertaken without briefing on the law or impact of the factual record on that analysis, was flawed because it ignored the affirmative command of Section 301 of the Copyright Act that no person was entitled to the right just created by the Eighth Circuit; (2) Petitioner could not have waived preemption on appeal since, by definition, it could not have been an issue *until* the Eighth Circuit *sua sponte* created the right prohibited by federal law; (3) the Eighth Circuit incorrectly conducted its own fact-finding on the consent issue said to be the linchpin of its decision and ignored the lower court's unappealed ruling that Respondent had consented to the videotape exploitation; and (4) holding Petitioner liable on a newly announced cause of action, which had not been tried because of limine rulings, denied Petitioner its rights to due process of law and trial by jury. On October 26, 1995, the Eighth Circuit denied the motion for reconsideration without comment.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Certiorari To Reverse The Eighth Circuit And Hold That A Federal Court Conducting A Predictive Law Analysis Under *Erie v. Tompkins* Is Not Free To *Sua Sponte* Create A Heretofore Non-Existent State Law Claim That Is Acknowledged By The Court To Violate Federal Law.

The United States Court of Appeals for the Eighth Circuit created and placed dispositive reliance upon a previously nonexistent cause of action in Minnesota that had not been argued for by Respondent – the tort of misappropriation of publicity rights. Although recognizing "the fact" that the new cause of action it had created was preempted by federal copyright law, the Eighth Circuit justified doing so by summarily stating that Petitioner had somehow waived the preemption issue by not timely raising it on appeal. (A10). Petitioner argues that this Court should grant certiorari for two reasons: (1) the Eighth Circuit's predictive analysis under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), is in conflict with the very purpose of the *Erie* doctrine and other precedents of this Court and other federal and state courts; and (2) the Eighth Circuit's decision "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Sup. Ct. Rule 10.1(a).

A. The Eighth Circuit Was Not Free To Disregard Federal Law In Its Predictive Law Analysis Under *Erie R.R. v. Tompkins*

The Eighth Circuit's predictive analysis of Minnesota law conflicts with this court's decision in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Petitioner contends that the *Erie* doctrine precludes a Federal court from creating a new state cause of action that the court acknowledges is affirmatively prohibited by federal copyright law. The fundamental mandate of the *Erie* doctrine is that "*[e]xcept* in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state." *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). That is particularly true when, as in this case, it was the court itself which crafted the newly announced state law claim without ever being urged to do so by the litigants before it.

Federal copyright law, "like other laws of the United States enacted pursuant to constitutional authority, [is] the supreme law of the land." *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964), citing *Sperry v. Florida*, 373 U.S. 379 (1963). Section 301 of the Copyright Act specifically provides that the Act governs *exclusively*

> all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by § 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by Sections 102 and 103 . . . *[N]o person is entitled to any such right or equivalent right* in any such work under the common law or statutes of any state.

17 U.S.C. § 301(a) (emphasis added). The breadth of the prohibition in Section 301 is undeniable. As Congress itself stated,

> [T]he intention of Section 301 is to preempt and abolish any rights under common law or statutes of a State that are equivalent to copyright and that extend to works coming within the scope of the federal copyright law. The declaration of this principle in Section 301 is intended to be stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress should act preemptively, and to avoid development of any vague borderline areas between state and federal protection.

H.R.Rep.No. 1476, 94th Cong., 2d Sess. 130 (1976), reprinted in 1976 U.S.C. C.A.N. 5659, 5746.[3] Federal law, therefore, affirmatively disables any state from "entitling" a citizen to a state law claim that is equivalent to the exclusive rights granted to the owner of the copyrighted works under Section 106 of the Copyright Act to authorize and sell copies of the works.

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[3] The supremacy of the federal interest in copyright protection is further evident in the vesting by Congress of exclusive jurisdiction over copyright claims in federal court. 28 U.S.C. § 1338(a). This grant of exclusive jurisdiction and the prohibitive force of Section 301 has led one federal court to hold that Congress intended that the preemptive force of Section 301(a) would "transform a state-law complaint asserting claims that are preempted by Section 301(a) into a complaint stating a federal claim for purposes of the well-pleaded complaint rule," thus allowing removal of the actions to federal district court. *See Rosciszewski v. Arete Assocs., Inc.*, 1 F.3d 225 (CA4 1993).

There can also be no doubt that Respondent's publicity right claim is prohibited by Section 301. Indeed, even the Eighth Circuit expressed no doubt. First, videocassettes are a tangible medium of expression within the subject matter of Sections 102 and 103. Second, the exclusive rights granted to the owner of the copyrighted rights under Section 106 include "the *exclusive* rights to do and to authorize" reproduction and sale to the public. Finally, the asserted state law claim is "equivalent to" one of the exclusive rights specified in Section 106 of the Copyright Act if the state law right may be abridged by an act which, in and of itself, would infringe one of the exclusive rights set forth in Section 106. *Harper & Row Publishers, Inc. v. Nation Enterps.*, 723 F.2d 195, 200 (CA2 1983), *rev'd on other grounds*, 471 U.S. 539 (1985). Under this test, the state law right is "equivalent" and therefore preempted if it is infringed by the mere act of unauthorized reproduction or distribution. *Id.* at 200-201; *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 676-77 (CA7 1986), *cert. denied*, 480 U.S. 941 (1987). Respondent's belated admission that he wanted to control the reproduction of WWF performances onto videocassettes clearly constitutes such prohibited interference, and it is respectfully submitted that the Eighth Circuit was duty-bound as federal jurists not to ignore federal law affirmatively disentitling all citizens from such a right.

Here, however, the panel majority not only knowingly disregarded dispositive federal law and entitled Respondent to a right Congress denied to all citizens, it did so even though the issue was not before the court and despite the lack of *any* authority acknowledging that

Minnesota even recognized the so-called "right of publicity". The result of this process is the creation by a *federal* court of a specialized verdict for *one* Minnesota resident – the very vices diversity jurisdiction and the *Erie* doctrine were designed to prevent.[4]

Such a result is not possible if *Erie* requires a federal court to apply federal law that the court recognizes is relevant. Consideration of whether the matter is governed by an Act of Congress is not a discretionary aspect of the *Erie* analysis; it is fundamental.[5] Indeed, to the

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[4] If left to stand, the panel opinion will be cited in the future for two completely contrary propositions: that Minnesota state law allows individuals appearing on copyrighted works to prevent the owner of copyrighted works from reproducing those works without the individual's consent *and* that Minnesota law does not provide such a right because it is affirmatively prohibited by federal law.

[5] *See e.g., Salve Regina College v. Russell*, 499 U.S. 225, 226 (1991) ("*Erie* mandates that a federal court sitting in diversity apply the substantive law of the forum State, *absent a federal statutory or constitutional directive to the contrary*") (emphasis added); *Lehman Bros. v. Schein*, 416 U.S. 386, 389 (1974) ("under the regime of *Erie*," a state law controls, "*providing there is no overriding federal rule which pre-empts state law*") (emphasis added); *Hanna v. Plumer*, 380 U.S. 460, 470 (1965) (*Erie* commands enforcement of state law "*there being no Federal Rule which covered the point in dispute, Erie* commanded the enforcement of state law"); *Hetzel v. Bethlehem Steel Corp.*, 50 F.3d 360, 363 (CA5 1995) (*Erie* doctrine does not apply in matters governed by federal law); and *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311, 1316 (CA9 1982) (*Erie* "does not purport to permit state control of areas in which Congress has acted pursuant to its constitutional authority"). *See also, Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111 (CA1 1988), *cert. denied*, 490 U.S. 1107 (1989); *Laws v. Calmat*, 852 F.2d 430, 434 n.5 (CA9 1988), and *United Ass'n of Journeyman and Apprentices of Plumbing and Pipe Fitting*

extent a federal court is free to make *sua sponte* decisions, the Supremacy Clause would appear to require federal jurists to raise *sua sponte* federal law it knows to apply, not *sua sponte* to disregard it. *See, e.g., Cassway v. Chelsea Historic Properties,* No. CIV.A. 92-4124, 1993 WL 64633 (E.D. Pa. Mar. 4, 1993) (after noting that state law can apply only if not in conflict with federal copyright law, trial court *sua sponte* raised preemption issue and dismissed state law claim); *Howard Fields & Assocs. v. Grand Wailea Co.,* 848 F.Supp. 890, 893 (D. Haw. 1993) (court *sua sponte* raised preemptive effect of Federal Arbitration Act).[6]

Indus., Local No. 57 v. Bechtel Power Corp., 834 F.2d 884, 889 (CA10 1987) (applying *Erie,* courts completed preemption analysis without deciding state law claim on merits).

[6] *See also, International Longshoremen's Ass'n, AFL-CIO v. Davis,* 476 U.S. 380, 393 (1986) (pre-emption under *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236 (1959), is non-waivable foreclosure of state court's jurisdiction to adjudicate); *Apponi v. Sunshine Biscuits, Inc.,* 809 F.2d 1210 (CA6), *cert. denied,* 484 U.S. 820 (1987) and *National Metalcrafters v. McNeil,* 784 F.2d 817 (CA7 1986) (courts refused to apply waiver doctrine to preclude employer's contention that claims were preempted by Labor Management Relations Act because of strongly held policy in favor of applying uniform federal principles in interpretation of collective bargaining agreements); *Chestnut-Adams Ltd. Partnership v. Bricklayers and Masons Trust Funds of Boston,* 612 N.E.2d 236 (Mass. 1993); *Gorman v. Life Ins. Co. of North America,* 811 S.W.2d 542 (Tex.), *cert. denied,* 502 U.S. 824 (1991); *Soniat v. Travelers Ins. Co.,* 538 So.2d 210 (La. 1989); and *Richland Hosp. Inc. v. Ralyon,* 516 N.E.2d 1236 (Ohio 1987) (Courts holding that ERISA preemption could be raised for first time on appeal). In other contexts, some courts have held that parties can waive preemption issues. *See, e.g., Sweeney v. Westvaco Co.,* 926 F.2d 29 (CA1), *cert. denied,* 502 U.S. 899 (1991) (opinion of then-Judge Breyer) (employer held to have waived Labor Management

Moreover, as the Eighth Circuit has itself acknowledged on prior occasions, its duty as a federal court making a predictive *Erie* determination under Minnesota law is to "ascertain as best we can the manner in which the Supreme Court of [Minnesota] would decide the issues . . . " *Carvin v. Arkansas Power and Light Co.*, 14 F.3d 399, 403-04 (CA8 1993). In that regard, Minnesota's Supreme Court would not acknowledge the existence of a state law right precluded by federal law. In *Holiday Acres No. 3 v. Midwest Fed. Sav. and Loan Assn.*, 308 N.W.2d 471, 474 (Minn. 1981), the Supreme Court of Minnesota ruled that, before deciding a first-impression question of state law, "we *must first decide* . . . whether the [f]ederal . . . regulations or other federal law preempt the operation of state law . . . ." (emphasis added). As observed by the Supreme Court of Minnesota, "[s]tate law that contradicts federal, obviously, is *outlawed* by the Supremacy Clause." *Id.* (emphasis added). The Minnesota Supreme Court would, therefore, consider and apply supreme federal law as the threshold part of its analysis *before* analyzing a

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Relations Act preemption defense). However, such cases are readily distinguishable from this case, where the appellate court *sua sponte* raised the claim on appeal without giving Petitioner the opportunity to raise the preemption defense. In any event, the division among courts on the more general question of the proper procedural approach with respect to preemption issues strengthens Petitioner's contention that a grant of certiorari on these issues is warranted. *See Washington v. Union Carbide Corp.*, 870 F.2d 957, 964 (CA4 1989) (Phillips, J., dissenting) (indicating need for the Supreme Court to address the proper procedural approach to preemption issues under Section 301 of the Labor Management Relations Act under special circumstances presented by an unsettled question of state law).

new putative state right. The Eighth Circuit was obligated under *Erie* to apply *Holiday Acres* in determining whether that court would announce a new state law claim without first determining if it was outlawed by federal law. Accordingly, this Court should grant this Petition in order to resolve the Eighth Circuit's conflict with this Court and other Federal and state courts by holding that a Federal court conducting an *Erie* analysis is not free to create a new state cause of action that it knows violates Federal law, either in general or in the specific context of the unique language of Section 301 of the Copyright Act.

B. The Eighth Circuit's Decision Has "So Far Departed From The Accepted And Usual Course Of Judicial Proceedings . . . As To Call For An Exercise Of This Court's Power Of Supervision."

This case entailed numerous departures from the accepted and usual course of judicial proceedings: ever mutating, vague theories of liability up to and at oral argument; a trial preclusion order prohibiting evidence on the so-called publicity rights claim now said to be dispositive; the *sua sponte* creation of a new cause of action which had been waived by Respondent; ensuing favorable fact-finding by the Eighth Circuit on the issue of Respondent's consent, even though that issue was decided against him by the trial court and not appealed; and finally an inverted application of appellate waiver principles against Petitioner to justify the foregoing. All this was done to create a right which the court knew was prohibited by federal law. Having crafted a preempted,

untried and unappealed cause of action to sustain a judgment rendered on entirely different factual and legal grounds, the Eighth Circuit then ignored a reconsideration petition that demonstrated that the new cause of action it announced was defeated in any event by a specific and unappealed trial court ruling not even considered by the Eighth Circuit. This Court should accordingly grant certiorari because the proceedings below have "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision." Sup. Ct. Rule 10.1(a).[7]

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[7] *See also Hobby v. United States*, 468 U.S. 339 (1984) (recognizing Court's supervision of administration of criminal justice in federal court); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) (Court granted certiorari because of obviously incorrect application of federal preemption doctrine); *United States v. Hale*, 422 U.S. 171, 181 (1975) (Court granted certiorari to exercise its supervisory power to consider whether evidentiary issue should have been sent to jury where issue had constitutional overtones); *Hanna v. Plumer*, 380 U.S. 460, 463 (1965) (Court granted certiorari because of threat to goal of uniformity of federal procedure posed by misapplication of *Erie* doctrine); *Elkins v. United States*, 364 U.S. 206 (1960) (Court granted certiorari to consider question of importance in administration of federal justice); *Allegheny County v. Mashuda Co.*, 360 U.S. 185, 188 (1959) (Court granted certiorari because of important question presented as to whether district court had discretion to abstain from exercise of diversity jurisdiction where case did not involve uncertain and difficult issues of state law); *Mallory v. United States*, 354 U.S. 449, 450 (1957) (Court granted certiorari to consider important question of federal civil procedure in capital case); *Hickman v. Taylor*, 329 U.S. 495 (1947) (Court granted certiorari to consider important question of civil procedure); *McNabb v. United States*, 318 U.S. 332, 340 (1943) (Court granted certiorari to supervise administration of criminal justice in federal courts).

That this trial, and the ensuing appellate proceedings, were tainted by Petitioner's ever mutating theories of liability cannot be disputed. The only two claims involving Respondent's consent to the videocassette exploitation were removed from the case prior to trial and not appealed. The only claim tried, which did not involve the issue of whether Respondent consented to the exploitation, was conceded at oral argument to be devoid of any precedential support at all. Yet somehow, Respondent ends up the recipient of a large award based on the untried consent claim found against him by the trial court and not appealed, even though it violates federal law.

The errors in judicial methodology employed by the panel majority to accomplish this result are particularly worthy of the exercise of this Court's supervisory powers. On the appellate record before the Eighth Circuit, the accepted and usual course for that court to have taken in the face of the admission that existing law did not support the judgment would have been simply to reverse the judgment. There was no other issue before the Court and no other vehicle to sustain the judgment before it. The court had not been asked to revisit the dismissal of the publicity rights claim in any brief filed with the court, and Respondent's counsel demonstrably did not rely on the existence of that right in any argument made to the court. When asked by Judge Arnold at argument to cite law supporting the proposition that Respondent had a right to control the reproduction of the videocassettes, counsel noticeably did *not* rely on any cases discussing publicity rights, nor could he in light of the unappealed dismissal of that claim. Thus, the initial departure from the accepted and usual course of judicial proceedings

occurred when the panel majority *sua sponte* gave unrequested life to a dismissed and unappealed claim without the benefit of any briefs or oral argument on that point. *See Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 488 n.7 (CA5 1984) (appellate court refused to address issue not pursued in trial court or appellate briefs or oral argument). And, as pointed out in Judge Arnold's dissent, the panel majority cited no "reliable data" indicating that Minnesota would recognize the right of publicity, which is part of the otherwise required *Erie* analysis. Such reliable data must tend to show "convincingly" how Minnesota's highest court would rule. *B.B. v. Continental Ins. Co.*, 8 F.3d 1288 (CA8 1994). *See also Newberg Const. Co. v. E.H. Crump & Co.*, 818 F.2d 1363, 1368 (CA7 1987) (federal courts are to exercise great restraint in expanding state law by recognition of novel claims yet to be recognized by that state's courts).

The *sua sponte* decisionmaking regarding an unappealed issue was not, however, the only departure from the usual and accepted judicial methodology. Even if it was proper to announce a new cause of action that no party advocated, it was not proper to try it on appeal and utterly ignore the critical findings of the trial court on the issue of consent and the associated limine rulings that clearly precluded evidence relevant to the publicity rights claim at trial. *See Anderson v. Bessemer City, N.C.*, 470 U.S. 564 (1985) (emphasizing deference to be accorded to district court's findings of fact under "clearly erroneous" standard of appellate renew implied by Federal Rule of Civil Procedure 52(a)). Respondent was at a minimum entitled to a remand and a jury trial on a claim that unquestionably had not been tried below. *See Byrd v. Blue*

Ridge Rural Elec. Coop. Inc., 356 U.S. 525, 530-532 (1958) (where trial court erroneously struck affirmative defenses thus precluding plaintiff from introducing evidence to meet defense, appellate court, in reversing trial court, erred in making its own determination on the record instead of remanding to give plaintiff an opportunity to introduce evidence). Petitioner was denied due process of law because it never had the opportunity to contest this newly announced cause of action. In fact, Petitioner correctly believed that it could not offer evidence relevant to the publicity rights claim by virtue of pretrial limine rulings. In its decision, the panel majority evidenced its awareness that the district court had excluded all evidence relevant solely to the publicity rights claim, but then dismissed the significance of that by a footnote stating "[m]oreover, the district court *implicitly* resolved this issue in Ventura's favor by awarding restitution under *quantum meruit*." (A9). (emphasis added). By this passage, and the location of the footnote, the panel seemed to be saying that the trial court had *implicitly* resolved the issue of whether Minnesota recognized the tort of misappropriation of publicity rights in Respondent's favor. In fact, the plain and undisputed record shows that the trial court did not implicitly accept the claim but instead *explicitly* rejected it not once, but twice, prior to trial. The trial court's written opinion after trial did not, in any way, shape, fashion, or form modify or reverse that decision.

The third departure from usual and customary judicial methodology was the panel's fact-finding on the very issue said to be the "only" way Respondent could prevail – if his performances could not be used without his

consent. Having set forth the dispositive fact related to the new cause of action it had announced, the panel then resolved the issue in favor of Respondent in a single conclusory phrase stating that "Titan's violation of this right makes Titan's use of Ventura's commentary without his consent unjust." The panel completely ignored the unappealed trial court decision against Respondent on that precise issue, and did not explain how it was unjust to do what federal law gives Titan the exclusive right to do. Once again, Respondent's failure to appeal the trial court's determination that he would not have a cause of action for misappropriation of publicity rights because he had consented to the videocassette exploitation meant that this issue was not before the panel for review. Moreover, Respondent's failure to appeal that critical finding was not inadvertent, since the trial court finding of consent was more than supported by substantial evidence.

The fourth and perhaps most serious departure from usual and customary judicial practice was the panel's studied indifference to "the fact that" the new state law right it created *sua sponte* to sustain the award was preempted by federal law. The record leaves absolutely no doubt that two federal jurists went out of their way to create a cause of action prohibited by the very Supremacy Clause they are sworn to uphold. It is a basic canon of judicial methodology that constitutional issues are to be avoided if it is practicable to do so. *Jean v. Nelson*, 472 U.S. 846, 854 (1985); *McCurry v. Tesch*, 824 F.2d 638, 640 (CA8 1987). Having ignored this canon, the panel attempted to duck the constitutional issue it created by stating that Petitioner had somehow waived the issue of whether the publicity right claim was preempted by not raising it on

appeal – a finding that would have required Petitioner to be clairvoyant in assuming that the Eighth Circuit would raise and decide an issue not before it.[8]

The Eighth Circuit's application of the appellate waiver doctrine is the fifth departure from usual and customary judicial practice. Indeed, the Eighth Circuit inverted the rationale for the appellate waiver doctrine, which is to prevent litigants from being surprised on appeal by issues upon which they have had no opportunity to introduce evidence. *Hormel v. Helvering*, 312 U.S. 552 (1941). The doctrine of waiver applied consistently with the policies behind the doctrine should operate against Respondent, not for him. In contrast, it is extremely unfair to have a trial preclusion order find that Respondent consented to the videocassette exploitation and therefore rule that no evidence on the publicity rights claim would be received, and then have that same issue decided in favor of a Respondent on appeal in the absence of any appeal from that determination. As stated by the Supreme Court regarding the concept of appellate waiver:

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared

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[8] The court offered no explanation of exactly when, how or why the preemption issue should have been raised on the appellate record before it. Moreover, as the record clearly shows, counsel for Petitioner advised the court at oral argument that preemption would be an issue if the publicity right claim were part of the appeal, which it was not. Additionally, when Respondent's assertion made at oral argument raised the copyright issue, Petitioner promptly filed a motion to file a supplemental brief addressing that issue.

> practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically argued would be out of harmony with this policy.

Id. at 558. Indeed, this Court has held that a federal appellate court is justified in resolving an issue not passed on below where the proper resolution is beyond any doubt. *See Turner v. City of Memphis, Tenn.*, 369 U.S. 350 (1962). This Court has also previously ruled that the doctrine of appellate waiver "should *not* be applied where the obvious result would be a plain miscarriage of justice." *Hormel v. Helvering*, 312 U.S. 552, 558 (1941). (emphasis added). It is a plain miscarriage of justice for a litigant to be told, as the trial court did in this case, that it has prevailed on the dispositive issue of consent to the point where no additional evidence will even be admitted, and then have the appellate court make a *sua sponte* contrary determination as to the dispositive issue without ever being asked to do so by Respondent.

The sixth and final departure from usual and customary practice occurred in response to the petition for rehearing. The panel's own decision made Respondent's consent the linchpin issue of his right to recover.[9] In its reconsideration motion, Petitioner attached the very opinion of the trial court, which was plainly not considered by the panel in its opinion, demonstrating that the trial court had explicitly resolved the consent issue

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[9] "Ventura's *quantum meruit* claim may succeed *only* if Titan's rights to use Ventura's performances are limited so that Titan is not entitled to use the performance without Ventura's consent". (A8).

against Respondent by language that went so far as to hold that not even Respondent's unplead fraud claim vitiated his consent. (E4). Petitioner also pointed out that ruling had not been appealed. The Eighth Circuit's response to being apprised of a specific trial court order on the very issue said to be dispositive was to deny reconsideration without comment. *See Byrd v. Blue Ridge Rural Elec. Coop. Inc.*, 356 U.S. 525, 531 (1958) (appellate court erred in denying without opinion petition for rehearing sought on ground that court's failure to remand denied petitioner constitutional right to jury trial on affirmative defense reinstated by appellate court).

As a result of the foregoing departures from traditional judicial methodology, Respondent stands to recover nearly one million dollars on a cause of action prohibited by federal law. Petitioner, on the other hand, is stripped of its property by denying it the benefits and protections afforded to it by federal law on the basis of an unrequested state "right" that existed in no statute, case, or discernable law of Minnesota at the time of the events in question, and without any opportunity to defend against it at trial by jury or otherwise.

In sum, the proceedings in this case have so far departed from the usual course as to call for an exercise of this Court's supervisory authority. Where the trial court twice refused to find a state law publicity right; where evidence relevant to it was excluded at trial; where the now dispositive fact of consent to use "publicity rights" is announced for the first time on appeal; where that dispositive fact was adjudicated against Respondent in any event at trial level; where no appeal of the now dispositive legal and factual rulings was made by

Respondent; and where a person gets nearly a million dollars for something prohibited by federal law as a result, something is plainly wrong. Accordingly, this Court has the unquestionable power and, it is respectfully submitted, obligation to exercise its powers of supervision in this case by granting certiorari and reversing the Eighth Circuit's decision. The obviousness of the Eighth Circuit's departure and the cursoriness of its analysis do not warrant the denial of this Petition – instead, they simply call for an equally concise and clear response from this Court, a *per curiam* reversal pursuant to Supreme Court Rule 16.1.[10]

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[10] *McKnight v. General Motors Corp.*, ___ U.S. ___, 114 S.Ct. 1826 (1994) (per curiam opinion reversing dismissal of appeal as frivolous); *Mireles v. Waco*, 502 U.S. 9 (1991) (per curiam opinion reversing decision that judge was not judicially immune from suit); *Freeport-McMoRan, Inc. v. K.N. Energy, Inc.*, 498 U.S. 426 (1991) (per curiam opinion reversing decision that addition of limited partnership as plaintiff destroyed diversity); *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam opinion reversing jury instruction decision); *Electric Workers v. Farnsworth & Chambers Co.*, 353 U.S. 969 (1957) (summarily reversing state court decision purporting to regulate labor union activities under provisions of state labor laws comparable to provisions of federal act).

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 94-3103

Jesse Ventura, doing business as Jesse "The Body" Ventura, also known as James G. Janos,

Appellee,

v.

Titan Sports, Inc., a Delaware corporation, doing business as Titan Sports Enterprises, doing business as World Wrestling Federation, doing business as The WWF,

Appellant,

A & H Video Sales Representatives, Inc., a New York Corporation, doing business as Coliseum Video; LJN Toys, Ltd., a New York Corporation; Putnam Publishing Group, and its Division Perigee Books, also known as Putnam Berkley Group, Inc.; Columbia House, a Foreign Corporation,

Defendants.

Appeal and Cross-Appeal from the United States District Court for the District of Minnesota.

No. 94-3235

Jesse Ventura, doing business as Jesse "The Body" Ventura, also known as James G. Janos,

Appellant,

v.

Titan Sports, doing business as Titan Sports Enterprises, doing business as World Wrestling Federation, doing business as The WWF, Inc., a Delaware Corporation,

Appellee,

A & H Video Sales Representatives, doing business as Coliseum Video, Inc., a New York Corporation; LJN Toys, Ltd., a New York Corporation; Putnam Publishing Group, also known as Putnam Berkley Group, Inc., and its Division Perigee Books; Columbia House, a Foreign Corporation,

Defendants.

Submitted: March 16, 1995

Filed: September 11, 1995

Before MAGILL, Circuit Judge, JOHN R. GIBSON, Senior Circuit Judge, and MORRIS SHEPPARD ARNOLD, Circuit Judge.

MAGILL, Circuit Judge.

This appeal arises out of a match between wrestler/commentator Jesse "The Body" Ventura and Titan Sports, Inc., which operates "The World Wrestling Federation" (WWF). Titan appeals the district court's judgment in favor of Ventura, arguing that (1) Ventura was not entitled to recovery under quantum meruit because an express contract covers the subject matter for which Ventura sought recovery; and (2) the district court erroneously admitted and relied upon the testimony of Ventura's damages expert. Ventura cross-appeals the district court's denial of prefiling interest.

We affirm in all respects.[1]

I. BACKGROUND

During July 1984, Titan entered into a licensing agreement with LJN Toys authorizing LJN Toys to manufacture dolls using the images of WWF wrestlers. Titan

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[1] We refer to the contracts negotiated by Ventura's agent, Barry Bloom, during the 1987-90 period as "post-Bloom" contracts. The earlier oral agreements between Ventura and McMahon we refer to as the "pre-Bloom" contracts.

also entered a "master licensing" agreement with DIC Enterprises that resulted in WWF T-shirts, trading cards, calendars, a computer game and numerous other items. In December 1984, Titan entered into a licensing agreement with A & H Video Sales (d/b/a Coliseum Video) for the production of videotapes of WWF matches. Agreements with A & H and Columbia House resulted in the production of approximately ninety videotapes of WWF performances involving Ventura.

Ventura began wrestling for Titan in Spring 1984 under an oral contract with Vincent K. McMahon, Titan's President and sole shareholder. In late 1984, Ventura suffered medical problems and ceased to work as a wrestler, although Titan continued to pay him during his convalescence. After Ventura recovered, he returned to work for Titan as a "color" or "heel"[2] commentator under an oral agreement with Titan. He was paid a flat rate of $1000 per week and there was no discussion of videotape royalties or licenses. Shortly after returning to work for Titan, Ventura executed a "Wrestling Booking Agreement" (WBA) with an effective date of January 1, 1985. Ventura subsequently resumed wrestling for Titan, for which he was paid according to the terms of the WBA. In March 1986, Ventura terminated his relationship with Titan in order to pursue an acting career.

Ventura's foray into movies was moderately successful, but in fall 1986 he returned to Titan as a commentator, again under an oral agreement that made no mention of

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[2] A color commentator provides the story of the wrestling match, which is in essence a stage show. A heel commentator is a color commentator who plays the role of "the bad guy."

videotape royalties or licenses. In fall 1987, Ventura hired Barry Bloom as his talent agent. Bloom negotiated on Ventura's behalf with Dick Ebersol, Titan's partner in producing the "Saturday Night's Main Event" show. However, the negotiations quickly broke down, and as a result, the first show of the 1987-88 season aired without Ventura. A few weeks later, Titan's Vice-President of Business Affairs, Dick Glover, contacted Bloom concerning Ventura and represented to Bloom that Titan's policy was to pay royalties only to "feature" performers. Because Ventura was interested in working for Titan, Bloom thought it wise not to attempt to "break the policy." Ventura returned to work for Titan under a new contract that waived royalties and continued to work as a commentator for Titan until August 1990. Since that time he has worked as a commentator for WCW, Titan's main competitor.

In December 1991, Ventura filed an action in Minnesota state court seeking royalties for the use of his likeness on videotapes produced by Titan. The original complaint contained causes of action for fraud,[3] misappropriation of publicity rights and quantum meruit. Titan removed the case to federal court, and the case was tried before a jury. Although only the quantum meruit claim was submitted to the jury, the jury was given a special verdict form concerning misrepresentation. Using this form, the jury found that Titan had defrauded Ventura

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[3] The fraud pleaded in Ventura's Complaint and Second Amended Complaint is that Titan fraudulently misrepresented to Ventura that Ventura was employed for no purpose other than a live performance. Second Amended Complaint ¶ 42.

and that $801,333.06 would compensate Ventura for Titan's videotape exploitation of his commentary. The jury also determined that Titan exploited Ventura's name, voice or likeness as a commentator in other merchandise and concluded that $8,625.60 would compensate Ventura for this exploitation.

After the jury rendered its verdict, the district court concluded that Ventura was not entitled to a jury trial on his quantum meruit claim. Accordingly, the court vacated the jury verdict and entered findings of fact and conclusions of law that were consistent with the verdict. The court denied Ventura's request for prefiling interest but granted prejudgment interest from the time the suit was filed. Titan appealed, and Ventura cross-appealed the denial of prefiling interest.

II. DISCUSSION

Titan raises three claimed errors on appeal. First, Titan argues that Ventura was not entitled to quantum meruit recovery of royalties for the videotape[4] exploitation of his performance as color commentator during the 1985-87 (pre-Bloom) period because Ventura provided his commentating services under an express contract. Second, Titan claims that the district court erroneously applied the law of quantum meruit when it rescinded an express contract and awarded Ventura royalties for the

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[4] For the sake of simplicity, we discuss the issues only in terms of the videotapes. However, the principles applied to videotape licenses and royalties apply equally to other merchandise.

videotape exploitation of his performance as color commentator during the 1987-90 (post-Bloom) period. Third, Titan alleges that the district court abused its discretion in qualifying and relying upon Ventura's expert witness in awarding damages. Ventura's cross-appeal presents a single issue: whether the district court clearly erred when it denied Ventura's request for prefiling interest. We address each of these issues in turn.

A. Is quantum meruit available during the pre-Bloom period?

Minnesota law determines the rights of the parties in this diversity action, and we review the district court's interpretation of Minnesota law de novo. *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991). The basic contours of the law of quantum meruit, or unjust enrichment, are well settled under Minnesota law:

> An action for unjust enrichment may be based on failure of consideration, fraud, mistake, and situations where it would be morally wrong for one party to enrich himself at the expense of another. However, a claim of unjust enrichment does not lie simply because one party benefits from the efforts or obligations of others, but instead lies where one party was unjustly enriched in the sense that the term 'unjustly' could mean illegally or unlawfully.

Hesselgrave v. Harrison, 435 N.W.2d 861, 863-64 (Minn. App. 1989) (internal quotations and citation omitted). Although the applicable law is well settled, the facts of this case are rather unique and therefore require us to address some preliminary issues.

The first unique aspect of this appeal involves defining the benefit received (allegedly unjustly) by Titan. Titan makes much of the fact that Ventura provided no services for Titan other than pursuant to the Ventura-Titan contracts. While it is true that the Ventura-Titan contracts governed all the services provided by Ventura (*i.e.*, his acts of appearing at the wrestling match and commentating), the agreements do not necessarily address all the benefits created by Ventura's services. Ventura's services created several varieties of intellectual property rights. In defining the "benefit" conferred upon Titan, the proper focus is not merely Ventura's labor as he performed, but must also include the intellectual property rights created by Ventura's performance. Thus, we find that the intellectual property rights to Ventura's commentary are benefits upon which an action for unjust enrichment may be based.

We next must determine whether Titan, in taking this benefit, was *unjustly* enriched. Ventura's quantum meruit claim may succeed only if Titan's rights to use Ventura's performance are limited so that Titan is not entitled to use the performance without Ventura's consent. We believe that Titan's rights are limited by Ventura's right to publicity. In determining the law of the State of Minnesota concerning publicity rights, we are bound by the decisions of the Minnesota Supreme Court. If the Minnesota Supreme Court has not addressed the issue, we must determine what that court would probably hold were it to decide the issue. The parties have identified, and we have discovered, no case in which the Minnesota Supreme Court has either accepted or rejected the tort of misappropriation of publicity rights. We must therefore attempt

to predict the decision of the Minnesota Supreme Court.[5] In making our prediction, we may consider relevant state precedent, analogous decisions, considered dicta, scholarly works and any other reliable data. *B.B. v. Continental Ins. Co.*, 8 F.3d 1288, 1291 (8th Cir. 1993).

We believe that the Minnesota Supreme Court would recognize the tort of violation of publicity rights. We are aware that Minnesota does not recognize the fourfold tort of invasion of privacy. *See Hendry v. Connor*, 226 N.W.2d 921, 923 (Minn. 1975); *Stubbs v. North Memorial Medical Center*, 448 N.W.2d 78, 80-81 (Minn. App. 1989). However, the right of publicity differs substantially from the right to privacy. *Uhlaender v. Hendricksen*, 316 F. Supp. 1277, 1280-81 (D. Minn. 1970); 2 Fowler V. Harper et al, *The Law of Torts* § 9.7, at 657 (1986). The policy underlying the tort of invasion of privacy is the protection of the privacy and solicitude of private personae from the mental distress that accompanies undesired publicity. *Uhlaender*, 316 F. Supp. at 1280. Minnesota courts have refused to adopt this policy on their own initiative. *Stubbs*, 448 N.W.2d at 81. However, the policy underlying the right to publicity is different in several important respects. The right to publicity protects the ability of public personae to control the types of publicity that they receive. The right to

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[5] We are aware that the district court excluded all evidence "relevant solely to [Ventura's] appropriation claim." Order at 4 (Feb. 2, 1994). Contrary to Titan's assertions, the law of the case doctrine does not preclude our review of this issue in the context of Ventura's quantum meruit claim. *See* 2A *Federal Procedure: Lawyers Edition* § 3:705, at 361 (1994). Moreover, the district court implicitly resolved this issue in Ventura's favor by awarding restitution under quantum meruit.

publicity protects pecuniary, not emotional, interests. *Uhlaender*, 316 F. Supp. at 1280-81. As such, the policy underlying the right to publicity is more akin to the policy underlying the protection of trade names, which Minnesota recognizes. *See* Minn. Stat. § 325D.165 (Supp. 1995) (1994 Amendment to Minnesota Unlawful Trade Practices Act); § 325D.44 (Supp. 1995) (Minnesota version of Uniform Deceptive Trade Practices Act). Indeed, the district court for the District of Minnesota has twice relied upon this distinction to recognize the right to publicity. *Uhlaender*, 316 F. Supp. at 1280-81 (distinguishing misappropriation from right of privacy); *McFarland v. E&K Corp.*, 18 U.S.P.Q.2d (BNA) 1246, 1247 (D. Minn. 1991) (quoting *Uhlaender*, 316 F. Supp. at 1281-82). Thus, we believe that the Minnesota courts would recognize the right to publicity, and Titan's violation of this right makes Titan's use of Ventura's commentary without his consent unjust.[6]

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[6] We are troubled by the fact that section 301(a) of the copyright code (Title 17) preempts Ventura's claims that are "equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106," such as the production of videotapes of Ventura's televised commentary. *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 675 (7th Cir. 1986) (baseball players' challenge to television broadcast of live games without their consent as a violation of their publicity rights preempted), *cert. denied*, 480 U.S. 941 (1987). However, Titan has not timely raised the issue of preemption on appeal, and has therefore waived it. *See. e.g., United States v. Eldeeb*, 20 F.3d 841, 843 (8th Cir.), *cert. denied*, 115 S. Ct. 269 (1994). We deny Titan's motion for leave to file a supplemental brief addressing these waived issues.

However, quantum meruit is not available simply because Titan may have been unjustly enriched. Minnesota law is clear that "[w]here an express contract exists, there can be no implied [in law] contract with respect to the same subject matter." *Reese Design v. I-94 Highway 61 Eastview Center Partnership*, 428 N.W.2d 441, 446 (Minn. App. 1988); *accord Sharp v. Laubersheimer*, 347 N.W.2d 268, 271 (Minn. 1984). On the other hand, if an existing contract does not address the benefit for which recovery is sought, quantum meruit is available regarding those items about which the contract is silent. *Holman v. CPT Corp.*, 457 N.W.2d 740, 745 (Minn. App. 1990); *Frankson v. Design Space Int'l*, 394 N.W.2d 140, 145 (Minn. 1986); *Sagl v. Hirt*, 52 N.W.2d 721, 725 (Minn. 1952).[7]

Between 1985 and 1987, Ventura performed services for Titan under two different agreements. Ventura's services as a wrestler are governed by the WBA; his services as a commentator are governed by his oral agreements with McMahon. Thus, two contracts existed between Ventura and Titan between 1985 and March 1986, when the WBA was terminated. Whether quantum meruit recovery was proper depends upon whether or not the two agreements between Ventura and Titan were of limited scope, addressing only televised live performances, or also included subsequent videotape releases of the performances. The district court found that the WBA precluded

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[7] A corollary of this rule is that quantum meruit is available if the benefit is conferred unknowingly, but not if the benefit is conferred merely as part of a bad bargain. *Galante v. Oz, Inc.*, 379 N.W.2d 723, 726 (Minn. App. 1986). For the reasons discussed below, we conclude that Ventura conferred the videotape rights upon Titan unknowingly.

royalties for the videotape exploitation of Ventura's performance *as a wrestler*. The district court also found that Ventura and Titan had no agreement concerning the payment of royalties for videotape exploitation of Ventura's performance *as a commentator*. This finding concerns the intent of the parties, *Cepeda v. Swift & Co.*, 415 F.2d 1205, 1207-08 (8th Cir. 1969), and as such, is a factual finding which we review only for clear error. 1 Steven A. Childress & Martha S. Davis, *Federal Standards of Review* § 2.23 (2d ed. 1991) ("The clearly erroneous rule generally applies to a finding regarding the intent of the contracting parties, at least where the contract is ambiguous.").

We have reviewed the record, and are left with no definite and firm conviction that a mistake has been made. From 1985 to 1987, there was no discussion of Titan's right to use Ventura's color commentary. At least initially,[8] Ventura was not aware of the impending videotape sales, as merchandising was not part of the industry practice. These facts support the conclusion that Ventura's contract for commentating services did not contemplate a license for videotape distribution. Accordingly, we hold that the district court's finding that the pre-Bloom Ventura-Titan contracts did not address videotape licenses or royalties is not clearly erroneous. *See Anderson v. Bessemer City*, 470-U.S. 564 (1985). We believe that the judgment of the district court was correct insofar as it awarded damages for the exploitation of Ventura's pre-Bloom commentating performances.

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[8] Ventura stated that he was aware that tapes were being distributed in 1985. App. at 99-100.

B. Is quantum meruit available for the post-Bloom period?

The post-Bloom contracts pose different issues. It is clear that Ventura performed commentating services between 1987 and 1990 pursuant to a series of contracts with Titan. It is also clear that the post-Bloom Ventura-Titan contracts included an arrangement concerning videotape royalties. Bloom specifically inquired about royalties and was told of the Titan policy. In reliance upon this purported policy, Ventura waived his rights to royalties. Titan contends that Ventura is not entitled to recovery in quantum meruit for the post-Bloom period because of the existence of express contracts waiving royalties. *See Sharp*, 347 N.W.2d at 271 (" 'It is fundamental that proof of an express contract precludes recovery in quantum meruit.' " (quoting *Bereza v. Thaldorf*, 149 N.W.2d 276 (Minn. 1967))). Thus, the question reduces to whether Ventura may avoid the express contract waiving royalties and recover these royalties under quantum meruit. We believe that the district court correctly concluded that Ventura was entitled to avoid the fraudulently induced contracts and to recover the reasonable value of the royalties.

We address two issues. First, we decide whether Ventura is entitled to introduce evidence of fraud when his only cause of action at trial was quantum meruit. Second, we address Titan's challenge to the sufficiency of the evidence concerning fraudulent inducement.

We believe that Ventura is entitled to introduce evidence of fraudulent inducement, despite the fact that this fraud theory was not pleaded. In ruling on pretrial

motions, the district court granted Titan's motion to exclude evidence concerning Titan's fraudulent misrepresentation of its royalty policy as proof of Ventura's fraud theory because Ventura had failed to plead Titan's fraudulent misrepresentations of its royalty policy with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure. Add. at 34-35. Although there was some confusion as to whether Ventura's pleaded fraud claim (*i.e.*, Titan's misrepresentations concerning its marketing plans for Ventura's commentaries) survived the district court's ruling, it is clear that Ventura abandoned all fraud claims before trial. App. at 53-57. The district court denied Titan's motion to strike Ventura's quantum meruit claim and held that Ventura could present his quantum meruit theory provided that he presented credible evidence of fraudulent inducement. Add. at 37. Titan's Sixth and/or Seventh Defenses in its Answer to Ventura's Second Amended Complaint raise a "covered by contract" defense to Ventura's quantum meruit claim. Because Ventura had no opportunity to file a responsive pleading, Federal Rule of Civil Procedure 8(d) deems Titan's "covered by contract" defense to be denied or avoided (*i.e.*, it permits Ventura to raise the fraudulent inducement issue although it was not pleaded). Fraud is only in the case because of this "covered by contract" defense. This fraud rescinded or set aside the contract, opening the door to his quantum meruit claim. Thus, we conclude that Ventura was entitled to introduce evidence of fraudulent inducement to avoid this defense.

Ventura clearly pursued only the rescission to eliminate the contract and open the door to quantum meruit

before trial. On the first day of trial, as preliminary matters were being decided, counsel representing Ventura stated unequivocally that "[w]e are not presenting any claim of misrepresentation or fraud in a separate cause of action." App. at 57. Ventura's counsel continued, making it clear that the only relevance of misrepresentation was to open the door to quantum meruit.

Thus, we conclude that the district court properly permitted Ventura to rescind the contract and recover in quantum meruit by proving fraudulent inducement to avoid Titan's "covered by contract" defense. We believe that Ventura's options were quite similar to those of the plaintiff in *Stark v. Magnuson*, 2 N.W.2d 814 (Minn. 1924).[9] In *Stark*, the defendant breached a contract with the plaintiff, and the plaintiff disaffirmed the contract and sought quasi-contractual recovery. The court approved of such a course of action. *Id.* at 815. We turn now to the issue whether Ventura actually proved the fraudulent inducement upon which his quantum meruit claim depends.

It is well established under Minnesota law that unjust enrichment and quantum meruit may arise from fraud or several other predicates. *See, e.g., Holman*, 457 N.W.2d at 745; *Hesselgrave*, 435 N.W.2d at 863; *Timmer v. Gray*, 395 N.W.2d 477, 478 (Minn. App. 1986); *Anderson v. DeLisle*, 352 N.W.2d 794, 796 (Minn. App. 1984). Nothing in these

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[9] In *Stark*, the plaintiff's right to rescind and seek quantum meruit was based upon the defendant's breach of contract. In the present case, Ventura's right to rescind and seek quantum meruit is premised upon Titan's fraud. However, this factual difference is immaterial.

Minnesota cases requires that all elements of a cause of action for fraud must be proved in order to use fraud as a stepping stone for quantum meruit. However, we begin with the elements of a cause of action for fraud under Minnesota law as a useful guide. *See Davis v. Re-Trac Mfg. Corp.*, 149 N.W.2d 37, 38-39 (Minn. 1967) (listing elements of cause of action for fraud). Titan argues that the evidence was insufficient to support the necessary findings of materiality, inducement, justifiable reliance, causation and damages. We disagree. Both Ventura's and Bloom's testimony support the district court's findings. The district court found their testimony to be credible, and we must give deference to the district court's credibility determinations. Fed. R. Civ. P. 52(a) ("due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses").

The evidence demonstrates that in 1987, Ventura hired Bloom to negotiate with Titan on his behalf. During negotiations, Glover told Bloom that Titan's policy was to pay royalties only to talent featured in their own videotapes, such as the "Best of" videotapes. Believing it difficult to break Titan's policy, Bloom negotiated an agreement under which Ventura agreed to perform for Titan as a commentator. The agreement did not entitle Ventura to royalties for videotapes of his performances, unless he was the featured performer. Ventura's compensation did not include any payment based on videotape sales.

Between 1987 and 1990, Glover and Bloom met annually, in person or by telephone, to negotiate Ventura's

performance fees for each broadcast season, and occasionally for special performances. During each negotiation, Bloom asked Glover whether Titan had changed its policy regarding the payment of videotape royalties, and each time Glover reiterated that no talent received videotape royalties unless they were the featured performer on a videotape. Glover also told Ventura of this policy. Bloom and Ventura relied on Glover's statements concerning Titan's royalty policy, and understood that by entering into fee agreements they waived any right Ventura had to royalties. Despite these representations, Titan simultaneously made numerous royalty payments which were inconsistent with the purported policy of not paying royalties except to featured performers.[10]

In light of this evidence concerning Titan's representations and its history of royalty payments, the district court concluded that from 1987 through 1990, Titan's representations to Ventura that its policy was to pay videotape royalties only to featured performers were false. The district court also found that had Ventura known that Titan did not abide by its stated policy, he

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[10] In 1985, 1986 and 1987, Titan paid videotape royalties to Hulk Hogan and Marvel Comics for "Wrestlemania I," "II" and "III," despite the fact that there was no featured performer in these productions. During 1988, Titan paid videotape royalties to all 54 wrestlers appearing in the "Survivor Series," to all 57 wrestlers appearing in "Wrestlemania IV" and to all 38 wrestlers appearing in "Summer Slam '88." Again, these payments were inconsistent with Titan's stated policy because none of these videotapes had one featured performer. Beginning in December 1988, Titan paid royalties to all wrestlers appearing in videotapes of pay-per-view events.

would not have accepted a deal which did not compensate him for the reproduction and sale of his performances on videotape. The court further found that Ventura justifiably relied on Titan's fraudulent misrepresentations of its royalty policy, and as a result Ventura suffered damages. Thus, the district court rescinded the 1987-1990 agreements, and permitted Ventura to recover in quantum meruit. In light of the abundance of supporting evidence, we find no basis for concluding the district court's findings were clearly erroneous or lacked sufficient evidentiary support.

C. Did the district court abuse its discretion when it relied upon the testimony of Ventura's damages expert?

Titan makes two challenges to the testimony of Ventura's damages expert, Weston Anson. First, Titan argues that the district court abused its discretion when it admitted Anson's testimony that was "without foundation, speculative and irrelevant." Titan also argues that the district court "ignored all of the reliable, relevant evidence." Although not specifically so labeled by Titan, we interpret this second argument as a challenge to the sufficiency of the evidence relating to damages.

Our analysis of the admissibility of expert testimony concerning reasonable royalty rates is controlled by Federal Rules of Evidence 702 and 703. These rules require that evidence of "scientific knowledge" provided by an expert must be relevant and reliable. *See Daubert v. Merrell Dow,* 113 S. Ct. 2786 (1993). *Sorenson by and through Dunbar v. Shaklee Corp.*, 31 F.3d 638, 647 n.13, 648 (8th Cir.

1994). Titan's challenge to the admissibility of Anson's testimony is two-pronged. First, Titan argues that the testimony, which had to do with the market rate for royalties for licensing intellectual property, was irrelevant to the damages issue at trial. Second, in what appears to be a reliability-based challenge, Titan argues that the testimony was impermissibly speculative. We review the district court's decision to admit expert testimony for abuse of discretion. *TCBY Sys., Inc. v. RSP Co.*, 33 F.3d 925, 929 (8th Cir. 1994).

We believe that the district court did not abuse its discretion when it found Anson's testimony to be relevant. The relevance inquiry under Rule 401 merges the common law requirements of relevancy and materiality. *See* Fed. R. Evid. 401 advisory committee's note. Anson's testimony is relevant if it makes any material fact more likely than the fact would be in the absence of his testimony. *See* 22 Charles A. Wright et al., *Federal Practice and Procedure* § 5165, at 48 (1982 & Supp. 1994).

Anson's testimony concerned a material fact. Minnesota cases generally state the amount of recovery in quantum meruit as the reasonable value of the benefit (or services) to the defendant. *See, e.g., Sagl*, 52 N.W.2d at 725; *Frankson*, 394 N.W.2d at 140; *Galante*, 379 N.W.2d at 726 ("value of the services rendered less benefits received"). Section 152 of the Restatement of Restitution, which applies in cases of conscious torts, defines the measure of recovery as the market value of the plaintiff's services irrespective of their benefit to the recipient. *Restatement of Restitution* § 152, at 606 (1937). Thus, regardless of whether Titan's actions rise to the level of a conscious tort, Anson's testimony concerning the market

value of Ventura's videotape license relates to material facts: the value of the license to Titan (the measure of recovery for nonconscious torts) and the value of royalties to Ventura (the measure of recovery for conscious torts).

Anson's testimony is relevant because it tended to fix the value of the license/royalty. By providing evidence of the market rate for videotape royalties, Anson's testimony (1) provided direct evidence of the market value of Ventura's license, which is the measure of Ventura's recovery if Titan's conduct was consciously tortious; and (2) assisted the jury in determining the reasonable amount that Ventura's license is worth to Titan by providing the competitive background against which Titan is operating. Titan argues that Anson's testimony is irrelevant because Glover and Bloom negotiated an arm's length deal that should be used as the measure of royalties and, alternatively, because Titan's policy which provides for a royalty rate of less than five percent should be used to determine the amount of the royalty. We reject these arguments. The proof identified by Titan simply provides evidence of a reasonable royalty rate; it does not render competing evidence irrelevant. Accordingly, we conclude that the district court did not abuse its discretion when it concluded that Anson's testimony was relevant.

We now turn to the related question whether Anson's testimony was reliable. Titan argues that Anson's testimony is unreliable because it is impermissibly speculative. In order to assess whether Anson's testimony is reliable, we must focus on the methodology and principles underlying the testimony, not the conclusions they

generate. *Sorenson*, 31 F.3d at 648. Anson arrived at his estimate of damages by applying a royalty percentage to Titan's revenues from wholesale distribution of the tapes. The sales figures for the ninety videotapes upon which Ventura appeared were not available, but net profits (a more conservative measure) were established to the penny ($25,733,527.94). The main dispute concerns the royalty rate applied to this figure to generate the royalty that is the measure of damages. Titan's expert figured damages in a similar fashion, applying varying royalty percentages and formulas to base amounts keyed to sales. Anson testified that a five percent royalty was the minimum that he would be satisfied with as an agent and was the single most likely rate, but that rates could range from 3.5% to 7.5%. When applied to the profits figure, these rates yield: $865,723.00 (3.5%), $1,236,747.00 (5%), and $1,855,121.00 (7.5%).

We believe that Anson's methodology in arriving at the royalty percentages was reliable. Anson based his opinion as to the reasonable royalty upon a survey of thousands of licensing agreements. It is common practice to prove the value of an article (*e.g.*, a videotape license) by introducing evidence of transactions involving other "substantially similar" articles (*i.e.*, other licenses). 2 John H. Wigmore, *Wigmore on Evidence* § 463, at 616-30 (James H. Chadbourn rev. 1979). Anson surveyed licensing agreements involving numerous sports and entertainment figures, App. at 487a (NFL), 489a (major league baseball), as well as various other types of characters. Although no individual arrangement examined by Anson was "on all fours" with the predicted Ventura-Titan license, in the aggregate, the licenses provided sufficient

information to allow Anson to predict a royalty range for a wrestling license. We believe that this methodology is sufficiently reliable to support the admission of Anson's testimony.

Titan's other arguments go mostly to Anson's qualifications as an expert. Anson's qualifications are quite impressive, and certainly more so than those of some experts whose testimony this court has permitted. *Compare* App. at 463-69 (detailing Anson's undergraduate and graduate education and work experience) *with Bennett v. Lockhart*, 39 F.3d 848, 856-57 (8th Cir. 1994) (affirming admission of testimony of deputy sheriff as expert concerning the likely effect of jumping from height of 25 feet into 5 feet of water), *cert. denied*, 115 S. Ct. 1363 (1995). Titan's arguments boil down to an argument that Anson cannot be qualified and his methodology cannot be trusted because he did not personally handle Ventura's licenses. This argument is meritless. Accordingly, we find no abuse of discretion in the district court's admission of Anson's testimony. We also find no merit to Titan's challenge to the sufficiency of the evidence to support the damages award.

D. Did the district court clearly err when it denied Ventura's request for prefiling interest?

On appeal, the parties agree upon the interpretation of Minnesota law. Under the interpretation adopted by the district court, prefiling interest may be awarded under Minnesota law if the claim was liquidated or readily ascertainable by reference to objective standards. *Northwest Airlines, Inc. v. Flight Trails*, 3 F.3d 292, 297 (8th

Cir. 1993) (citing *Potter v. Hartzell Propeller, Inc.*, 189 N.W.2d 499 (Minn. 1971)). The district court's determination that Ventura's claim was not readily ascertainable is a factual finding reviewed for clear error. *Northwest Airlines*, 3 F.3d at 298.[11] Prejudgment interest has been denied where ambiguities in a commission agreement included the length of the required period preceding notice of termination, the exact sales base for the commission and the commission rate (5% vs. 7%). *Bitronics Sales Co. v. Microsemiconductor Corp.*, 610 F. Supp. 550, 555 (D. Minn. 1985) (Murphy, J.).

Although in this case the ultimate award of damages was made by reference to objective standards (market value), there are sufficient questions to prevent it from being "readily ascertainable," thereby precluding an award of prejudgment interest. Anson's testimony established that although 5% was the most likely rate, the potential royalty rate varied between 3.5% and 7.5%. Moreover, as there was no agreement, certain payment details, such as the wholesale sales base, the categorization of tapes upon which Ventura appears in multiple roles and the time periods for accrual and payment of royalties, were also unsettled. Thus, this case presents ambiguities similar to those encountered in *Bitronics*. The precise royalty rate and payment details were contingencies that the jury was required to resolve. Minnesota law

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[11] We are aware that several Minnesota cases predating *Northwest Airlines* state that the standard of review is de novo. However, we are bound to follow Eighth Circuit precedent. We note that our resolution of this issue would be no different were we to review the matter de novo.

precludes an award of prefiling interest where the fact-finder must resolve such contingencies. *Hutchinson Util. Comm'n v. Curtiss-Wright Corp.*, 775 F.2d 231, 242 (8th Cir. 1985); *Unique Sys., Inc. v. Zotos Int'l, Inc.*, 622 F.2d 373, 379-80 (8th Cir. 1980).[12]

Minnesota cases have also found that 200% variations in damages from low to high estimate preclude an award of prefiling interest. *Potter*, 189 N.W.2d at 504 (no prefiling interest where range of $45,000 to $95,000); *Hogs Unlimited v. Farm Bureau Mut. Ins. Co.*, 401 N.W.2d 381, 387 (Minn. 1987) (no prefiling interest where range of $218,500 to $428,250).[13] Cases in which prefiling interest

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[12] *International Financial Services v. Franz*, 515 N.W.2d 379 (Minn. App. 1994), *aff'd and rev'd*, 1995 WL 396853 (Minn. 1995), is not to the contrary. In *IFS*, an award of prefiling interest was affirmed where a jury awarded $216,000 in damages as the difference between the value of a photo-plotting machine as warranted and as delivered. *IFS* contains no discussion of any range of damages estimates, but it is not unlikely that the estimates of the value of a photo-plotting machine were more consistent and less contingent (and hence more readily ascertainable) than those involved here.

[13] *Lacey v. Duluth, Missabe & Iron Range Ry.*, 51 N.W.2d 831 (Minn. 1952), upon which Ventura relies, is consistent with this analysis. In *Lacey*, an award of prefiling interest was affirmed where the amount in dispute ranged from approximately $4750 to $9300. The *Lacey* court affirmed an award of prefiling interest, noting that the amount ultimately awarded ($7,127.03) did not differ from the amount requested ($9,307.17) by an "unreasonable" amount. *Lacey* focused upon the difference between the high end of the damages range and the amount awarded rather than the range of damages estimates. In *Lacey*, the award-estimate difference found to be reasonable was less than 25% of the amount of the requested amount. In the instant case, the difference is several times that amount, and may easily be viewed as "unreasonable" as that term was used in *Lacey*.

is awarded involve much less extreme variations. *See, e.g., Pearson-Berke, Inc. v. McIntosh,* 350 N.W.2d 378 (Minn. 1984) (interest awarded where recovery varied between $4,822.50 and $6858); *Polaris Indus. v. Plastics, Inc.,* 299 N.W.2d 414 (Minn. 1980) (denial of prefiling interest on $66,758.31 of $208,391.98 verdict reversed where "[w]ith the exception of about $21,000 . . . the jury's award reflected item by item the exact amount of out-of-pocket expenses"). Accordingly, we find that the district court did not commit clear error in denying prefiling interest where Ventura's damages estimates varied by over 200% ($865,723 to $1,855,121).

III. CONCLUSION

The district court did not clearly err when it determined that Ventura's pre-Bloom contracts did not address videotape licensing and royalties. Accordingly, it did not err in permitting quantum meruit recovery of videotape royalties for the pre-Bloom period. Nor did the district court err when it awarded quantum meruit recovery for the post-Bloom period. We also find that the district court did not abuse its discretion in qualifying Anson, nor did it abuse its discretion in determining that Anson's testimony was relevant and that the methods used by Anson were reliable. We further find that the district court did not clearly err in denying Ventura's request for prefiling interest where Ventura's potential damages varied by over 200% and where the amount was contingent upon the factfinder's determination of unresolved issues.

MORRIS SHEPPARD ARNOLD, Circuit Judge, dissenting.

I dissent from so much of the court's opinion as allows Mr. Ventura a recovery for royalties before Mr. Bloom negotiated a contract for him. To state a cause of action for unjust enrichment in Minnesota, a plaintiff must show either on legal or equitable grounds, or based on principles of natural justice, that a defendant's retention of a benefit would be unjust. *Mehl v. Norton*, 201 Minn. 203, 205-07, 275 N.W. 843, 844-45 (1937). In the court's view, Mr. Ventura was deprived of a legal right to additional compensation because Titan infringed his right of publicity. I believe that the court has mistakenly allowed this recovery, however, because I do not think that a right of publicity exists under Minnesota law.

The court finds a right of publicity under Minnesota law in the absence of any evidence that Minnesota's courts would welcome this cause of action – and, indeed, a Minnesota Supreme Court case indicates to me that they would not. Minnesota has not adopted the tort of appropriation of name or likeness or any of the other torts collectively known as invasion of privacy, *Hendry v. Conner*, 303 Minn. 317, 319, 226 N.W.2d 921, 922-23 (Minn. 1975), and a right to one's likeness is virtually indistinguishable from a right of publicity. *See Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834 (6th Cir. 1983). With respect, the two federal cases that the court relies on offer no significant support for its conclusion. *Uhlaender v. Hendricksen*, 316 F. Supp. 1277, 1279-80 (D. Minn. 1970), was decided before *Hendry*, and *McFarland v. E & K Corp.*, 18 U.S.P.Q.2d (BNA) 1246 (D. Minn. 1991), cites no Minnesota state cases whatever for the existence

of a right of publicity. It is also not irrelevant that a majority of states do not recognize a cause of action based on a right of publicity, Donald S. Chisum and Michael A. Jacobs, *Understanding Intellectual Property Law* 6-67 (1992), and it appears that most states that have adopted one have done so by statute. *See id.* at nn. 2 & 3. Finally, it is highly significant that, in the year 1995, when everyone not only wants his or her fifteen minutes of fame but the concomitant television rights as well, no Minnesota state court has yet discovered a right of publicity in Minnesota law. The court has thus cited no "reliable data," *B.B. v. Continental Ins. Co.*, 8 F.3d 1288, 1291 (8th Cir. 1993), to indicate that Minnesota would recognize such a right. Titan was therefore not enriched in violation of a legal right recognized in Minnesota.

Nor has Mr. Ventura shown that it would be inequitable or violate natural justice for Titan to reproduce and sell the videotapes that it produced and on which Mr. Ventura was already paid to appear as an announcer without paying him additional consideration. The doctrine of unjust enrichment, it is true, may provide recovery for performing extra services not specified in an original contract, *Sagl v. Hirt*, 236 Minn. 281, 287, 52 N.W.2d 721, 725 (1952), but Mr. Ventura does not argue that he performed any duties in addition to his commentary. One may also recover to prevent unjust enrichment if a benefit is conferred "unknowingly" or "unwillingly," *Galante v. Oz, Inc.*, 379 N.W.2d 723, 726 (Minn. App. 1986), but Mr. Ventura's own testimony shows that he did not confer the alleged benefit unknowingly or unwillingly. More important, it is hardly unjust, from an economic viewpoint, that Titan should receive the full benefit from

selling copies of the videotapes that it created. Titan, as entrepreneur, staged the wrestling matches, hired the various wrestlers, hired the announcers, and, above all, took the risks that the venture would fail to turn a profit. Now that Titan has been successful, Mr. Ventura wants additional compensation for having performed no additional work. If there is any unjust enrichment in this case, it is in allowing Mr. Ventura a recovery under these circumstances.

Plaintiff cites *Frankson v. Design Space Int'l*, 394 N.W.2d 140, 145 (Minn. 1986), and *Holman v. CPT Corp.*, 457 N.W.2d 740, 745 (Minn. App. 1990), for the proposition that when there is a lack of full agreement concerning compensation an employee may still recover in quantum meruit. That is no doubt so. But those cases are inapposite because each involved performances that had concededly not been compensated. The issue in each was whether sales employees would be allowed to recover commissions. In *Frankson*, the court held that the parties never reached an agreement about commissions and that therefore the plaintiff should be allowed a quantum meruit recovery. In *Holman*, plaintiff was terminated before she realized a commission on a sale that was virtually complete but still pending when she was fired, and the contract was silent with respect to whether a commission was due under the circumstances. Mr. Ventura, by contrast, performed and was compensated for his performances. He made an agreement to be paid a weekly sum rather than royalties for announcing wrestling events, and while he now regrets this less favorable arrangement, his regrets are not actionable under Minnesota law

because one cannot recover for an unfavorable bargain. *See Galante*, 379 N.W.2d at 726.

Nelson v. Radio Corp. of Am., 148 F. Supp. 1 (S.D. Fla. 1957) is an instructive case. Nelson, a vocalist, was hired to perform with the Glenn Miller Orchestra. Miller paid him weekly according to union scale. Nelson sang six selections for a recording session and two more for a broadcast that also was recorded. Miller assigned all his rights in the records to the defendant, and in due course, defendant made copies of the recordings for sale. Nelson sued for an accounting for the sale of the recordings on which he sang, a 5 percent royalty on the records, as well as injunctive relief and damages. The evidence established that Nelson had no agreement with Miller entitling him to receive any royalties on the sale of photograph [sic] records. The court ruled that "any right in and to phonograph records or other recordings in connection with the production of which plaintiff worked were the property of the plaintiff's employer Miller. . . . " 148 F. Supp. at 3. The court therefore rejected Nelson's claim for royalties.

The reasoning of *Nelson* is highly persuasive and our case is strikingly similar to it. Mr. Ventura agreed to receive weekly pay to perform wrestling commentary. He does not dispute, as far as I can discern, that the videotapes belong to Titan. Mr. Ventura, like Nelson, is suing for a royalty on the sales of the recordings on which he performed. And like Nelson, Mr. Ventura deserves no recovery because he and Titan both performed under their contract and the recordings of Mr. Ventura's performances now belong to Titan and it may profit from them as it sees fit.

Finally, even if Minnesota recognized a cause of action for the breach of a right of publicity, and even if this case could be properly characterized, as the court seems to believe, as a dispute over the scope of a license of intellectual property rights (that is, publicity rights), I still doubt that Mr. Ventura should recover. Mr. Ventura himself testified that he was employed to "broadcast wrestling." The agreement was therefore clearly susceptible to the construction that it authorized the sale of videotapes to end users. According to a leading copyright treatise, the preferred rule for copyright contracts when the intent of the parties is unclear is that the licensee may properly pursue any uses that may reasonably be said to fall within the medium as described in the license. 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 10.10[B] at 10-93 (1993). It follows "that a grant of the right to exhibit a motion picture by 'television' in its unambiguous core meaning refers to over-the-air television broadcasts, but in its ambiguous penumbra includes any device by which the motion picture may be seen on television screens, including cable television and videocassette uses." *Id.* at 10-94. The ambiguity ought to favor the licensee because "it is surely more arbitrary and unjust to put the onus on the licensee by holding that he should have obtained a further clarification of a meaning that was already present than it is to hold that the licensor should have negated a meaning that the licensee might then or thereafter rely upon." *Id.* I believe that this principle is recommended by reason and is applicable here because a right of publicity does not differ in any material way from a copyright. *See Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 679

(7th Cir. 1986), *cert. denied*, 480 U.S. 941 (1987). Mr. Ventura testified that he was hired to perform commentary for television broadcasts. "Television broadcasts" under these circumstances must reasonably include dissemination of the videotapes containing the commentary that Mr. Ventura performed as part of his employment. Indeed, this seems to me utterly implicit in the original contractual arrangement.

For the foregoing reasons, I believe that Mr. Ventura's claim for additional compensation for his announcing duties in the period before Mr. Bloom negotiated a contract for him fails as a matter of law. I would therefore reverse that part of the judgment allowing Mr. Ventura's recovery for his role as a commentator before he entered into the written contract.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Jesse Ventura (d/b/a Jesse "The Body" Ventura, a/k/a James G. Janos),

Plaintiff,

v.

Titan Sports, Inc. (d/b/a Titan Sports Enterprises, The World Wrestling Federation, and the WWF), a Delaware corporation; A&H Video Sales Representatives, Inc. (d/b/a Coliseum Video), a New York corporation; LJN Toys, Ltd., a New York corporation; Topps Chewing Gum, Inc., a New York corporation; Putnam Publishing Group and its division Perigee Books (n/k/a The Putnam Berkeley Group, Inc.), a New York corporation; and Columbia House, a foreign corporation,

Defendants.

Civil No. 3-91-811

ORDER

(Filed Feb. 2, 1994)

The defendants (collectively "Titan" except when noted otherwise) submit eleven motions in limine. Not to be outdone, Ventura counters with eleven motions in limine of his own.

A. Titan's Motions in Limine

1. To Exclude Fraud Claim

Titan moves for an order excluding argument and evidence with respect to a fraud claim it asserts Ventura will make but failed to plead in his second amended complaint. Ventura's second amended complaint alleges that Titan represented to Ventura that "he was being employed for individual live performances and for no other purpose or reason." Second Amended Complaint ¶ 42. The complaint also alleges that Titan intended from the beginning to sell videotapes of the performances and that it misled Ventura by "concealing facts relevant to Titan's true-intent to commercially exploit plaintiff's live performances." *Id.* ¶ 44. Titan characterizes this as a claim that it misled Ventura about *whether* videotapes would be sold.

In his memoranda, however, Ventura drops the claim that he was misled about whether videotapes would be sold. Instead, he argues that Titan's fraud consisted of misrepresenting that its policy was to pay royalties only to featured wrestlers. Ventura was not a featured wrestler on the tapes. Therefore, he contends, he assumed that seeking royalties would be fruitless. But, argues Ventura, Titan did not actually have a "policy" of paying royalties only to featured wrestlers. Had he known that, he asserts, he would not have agreed to do the commentary or announcing without some form of compensation for future videotape sales.

Titan argues that the fraud claim Ventura now articulates is not the one he pled in his second amended complaint. Fraud claims must be pled with particularity. Fed.

R. Civ. P. 9(b). Therefore, Titan argues, the only fraud claim Ventura should be permitted to present at trial is that it misled Ventura about *whether* videotapes would be sold. Moreover, Titan contends, Ventura's current version of the fact – that he knew videotape sales were in the offing – is inconsistent with the allegations in his complaint – that Titan told him he was being hired only for live performances.

In response, Ventura attempts to bring his current allegations within the language of his second amended complaint. He argues that the complaint's allegation that Titan misled him by "concealing facts relevant to Titan's true intent to commercially exploit" his live performances encompasses his current claim that Titan misled him about its videotape royalty policy.

Ventura's current allegations, however, are plainly inconsistent with his second amended complaint. Paragraph 42 of the complaint unambiguously alleges that Titan represented that Ventura's announcing and commentary would be used only for live performances. Therefore, the vague allegation that Titan "conceal[ed] facts relevant to [its] true intent" cannot be interpreted to mean that Titan misrepresented its royalty policy on sales of videotapes of the live performances.

Because Ventura's current allegation that Titan misrepresented its royalty policy is inconsistent with the fraud claim he pled, the court will not permit him to make such an argument or offer such evidence in the jury's presence.

2. To Exclude Argument and Evidence Relevant to Misappropriation Claim

Titan moves for an order to exclude argument and evidence with respect to Ventura's misappropriation claim, on the grounds that Ventura consented to Titan's commercial exploitation of his name, voice, and likéness.

Appropriation, or "misappropriation," is one of four varieties of the tort of invasion of privacy. *See Stubbs v. North Memorial Medical Center,* 448 N.W.2d 78, 81 (Minn. App. 1989). Minnesota does not recognize a cause of action for invasion of privacy. *Id.* Therefore, Ventura may not, in the jury's presence, make arguments or introduce evidence relevant solely to the appropriation claim.

3. To Strike Quantum Meruit Claim

Titan moves for an order striking Ventura's quantum meruit claim. A motion to strike a claim would seem to be the equivalent of a motion for summary judgment on that claim. But a motion to strike a claim is not technically a motion for summary judgment. In this circuit, courts must strictly comply with Federal Rule of Civil Procedure 56. *Williams v. City of St. Louis,* 783 F.2d 114 (8th Cir. 1986). Thus, this court may not grant summary judgment sua sponte. *Id.* Therefore, the court will treat the motion to strike as one to exclude argument and evidence relevant solely to the quantum meruit claim.

The basis for Titan's motion is that a valid contract governs Titan's use of Ventura's image. Where a valid contract governs the dispute at issue, a claim in quantum meruit does not apply. *Sharp v. Laubersheimer,* 347 N.W.2d

268, 271 (Minn. 1984). Titan asserts that both the 1985 Booking Agreement and the commentary and announcing contracts negotiated between 1987 and 1990 govern the parties' rights to Ventura's performances as a commentator and announcer.

Ventura contends, however, that his quantum meruit claim is for "residual compensation for the exploitation of [Ventura]'s performances as a broadcaster." Ventura claims there was no contractual agreement between the parties regarding such "residual compensation."

The court agrees, for the reasons stated below in section A.11., that the 1985 Wrestling Booking Agreement does not apply to Ventura's performances as a commentator and announcer. On the other hand, the 1987-1990 commentary and announcing contracts necessarily govern the performances to which they relate. However, in response to Titan's motion to strike the fraud claim, see section A.2. below, Ventura contends Titan fraudulently induced him to enter into these contracts. Were this so, the contracts might be invalid. *See Carpenter v. Vreeman*, 409 N.W.2d 258, 260-61 (Minn. App. 1987) (holding that a contract is voidable where assent is induced by fraudulent misrepresentation on which reliance is justified). Therefore, Titan's motion is denied and Ventura will be permitted at trial to argue and offer evidence relevant to his claim for quantum meruit so long as he presents credible evidence of fraudulent inducement.

4. To Exclude Argument and Evidence Related to Claims Against A&H and Columbia House

Titan moves for an order excluding argument and evidence at trial related to Ventura's claims against A&H Video Sales Representatives, Inc. and the Columbia House Company. A&H and Columbia House were, respectively, licensee and sublicensee of Titan. The two companies produced and sold the Titan videotapes on which Ventura appeared as a commentator and announcer.

Ventura does not claim that A&H and Columbia House fraudulently induced him to enter into any contract, and the court has already concluded that Ventura may not offer argument or evidence relative solely to the appropriation claim. This leaves only the quantum meruit claim as a basis for the admission of evidence against A&H and Columbia House.

A claim for quantum meruit is one for services rendered in the absence of a contract. *See Sharp v. Laubersheimer*, 347 N.W.2d 268, 271 (Minn. 1984). Ventura seeks a quantum meruit award representing "reasonable royalties" on sales of videotapes in which he appears. In negotiating his compensation, Ventura dealt with Titan, not A&H or Columbia House. Indeed, Ventura does not suggest that he did or would have had any dealings with A&H or Columbia House. Thus, if he were entitled to royalties, it seems that Titan would owe them, not A&H or Columbia House. Nor is there any reason to think that a royalty agreement between Titan and Ventura would have affected the licensing agreements between Titan,

A&H, and Columbia House. Therefore, barring any evidence that the lack of a royalty agreement conferred a benefit on A&H or Columbia, Ventura may not offer argument or evidence relevant solely to a claim against A&H or Columbia House.

5. To Exclude Evidence of Revenues or Profits From Videotape Sales

Titan moves for an order excluding evidence of its revenues and profits from videotape sales. Ventura states, in the memorandum accompanying his motion in limine number 8 (see section B.8. below), that Titan's net revenues or profits from videotape sales are irrelevant. This motion, therefore, is moot as to net revenues or profits.

6. To Exclude Certain Evidence Barred by the Statute of Limitations

Titan moves for an order excluding from trial any evidence relating to revenues or profits from videotapes or other merchandise that was sold or first sold prior to November 25, 1985. In light of the discussion in section A.5., Titan's motion is moot with respect to net revenues or profits.

7. To Strike Ventura's Duress "Defense"

Titan moves for an order striking Ventura's "defense" that he entered into the 1985 Wrestling Booking Agreement under duress. Ventura's argument that he signed the 1985 Booking Agreement under duress is relevant

only if the Booking Agreement governs his performance as a commentator and announcer. Because it does not, as determined below in section A.11., this motion is moot.

8. To Strike Unjust Enrichment Claim

Titan moves for an order precluding evidence of and striking any claim by Ventura for unjust enrichment. A claim of unjust enrichment is essentially equivalent to one under a quantum meruit theory. *See Sharp v. Laubersheimer,* 347 N.W.2d 268, 271 (Minn. 1984). Therefore, the court denies this motion for the same reasons it denied, in section A.2., Titan's motion to strike the quantum meruit claim.

9. To Exclude Gary Capetta's Testimony

Titan moves for an order excluding the testimony of Gary Cappetta. According to the parties, Cappetta was a referee at several of Titan's live wrestling matches. Cappetta filed suit in New York, claiming Titan misappropriated his name and likeness by selling merchandise incorporating his likeness. Ventura contends that Cappetta's testimony is relevant to show that Titan had a habit and business practice of commercially exploiting people's names and likenesses without their permission. Titan responds that Cappetta's testimony is irrelevant or should be excluded on several Rule 403 grounds. Without knowing precisely the context in which Cappetta's testimony will be offered, the court is unable at this time to grant or deny Titan's motion.

10. To Exclude Certain Evidence as Barred by Statute of Frauds

Titan moves for an order excluding evidence of an alleged oral, seven-year employment contract as barred by the statute of limitations. Ventura claims that, in order to induce him to wrestle for the World Wrestling Federation, Titan orally guaranteed him seven years of bookings. However, Ventura says, he is not suing to enforce the seven-year guarantee. Therefore, he states, he will offer evidence of the seven-year agreement only to provide the context for his signing of the 1985 Booking Agreement. The statute of frauds does not bar such a use of the evidence and Titan offers no other basis for exclusion. Therefore, the motion is denied.

11. To Determine the Effective Period for the 1985 Booking Agreement

Titan moves for an order determining that a "booking agreement" between Titan and Ventura remained effective and enforceable throughout the period relevant to this lawsuit. Titan and Ventura refer to the agreement at issue, dated January 1, 1985, as the 1985 Wrestling Booking Agreement.

The Booking Agreement describes Titan as a promoter "in the business of arranging and staging wrestling events," and of "representing professional wrestlers in the promotion of such wrestler's name, likeness and personality." Wrestling Booking Agreement, 1st "whereas"

clause. The Agreement describes Ventura as "a professional wrestler who desires Promoter to arrange wrestling events for the Wrestler and to represent Wrestler in the promotion and exploitation of Wrestler's name, likeness and personality." *Id.* 2d "whereas" clause.

Under the Agreement, Ventura granted to Titan the rights to "book Wrestler" for "events"; to sell tickets to events; to own the products of Ventura's services under the contract; to film events; to use the product of Ventura's services, including the sale of videotapes; to use Ventura's name and likeness in advertising; and to enter into merchandising agreements "on behalf of Wrestler" using Ventura's name and likeness. *Id.* § 1. In return, Titan promised to pay Ventura $50 a day for services rendered, a percentage of the gross gate receipts for events in which he performed, twenty-five per cent of the gross receipts from merchandise licensing, and five per cent of the gross receipts from any other exploitation of Ventura's name and likeness. *Id.* § 4.

The Agreement provided that it was to expire in two years, but that it would "automatically renew" for successive one year terms until either party notified the other in writing of its intent to terminate the Agreement. *Id.* § 3.

Titan contends that the Agreement remained in effect through 1990 because neither party served written notice of intent to terminate. Titan also argues that the Agreement governed Ventura's services as a commentator and announcer from 1987 to 1990. Titan describes these commentary and announcing agreements as "supplemental" to the 1985 Booking Agreement.

The Agreement governs the commentary and announcing agreements, according to Titan, because Ventura agreed to provide "wrestling and wrestling-related services." Announcing and providing commentary, Titan contends, is a wrestling-related service.

Ventura responds that the Booking Agreement became ineffective once he stopped wrestling in 1986, and, in any event, that it does not apply to his services as a commentator and announcer. Ventura states that he ceased wrestling for Titan in March 1986 for health reasons. Beginning in the fall of 1987, however, he entered into what he describes as independent "appearance" contracts with Titan. Under these contracts, Titan paid Ventura specific amounts for specific appearances. Ventura says neither party ever mentioned the 1985 Booking Agreement when they negotiated these contracts. Moreover, he says, Titan never paid him royalties for the exploitation of his name and likeness.[1]

Ventura argues that the Booking Agreement applies only to his services as a wrestler, not as an announcer and commentator. Therefore, he concludes, although neither party served written notice of termination, the Agreement "died a quiet death" in March 1986 because it

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[1] Titan claims that the Booking Agreement obligated it to pay royalties only on merchandise, as opposed to videotapes, and that it did pay such royalties. Section 4(a)(iii) of the booking agreement does not seem to support a videotape-merchandise distinction. It states that Ventura was to receive 5% of the gross receipts from "any" exploitation of Ventura's name and likeness.

"failed of its essential purpose." Furthermore, he contends, the parties terminated the Agreement by "abandonment" after 1987 because they did not refer to it when they negotiated the commentary and announcing agreements and because Titan allegedly failed to pay royalties due under it. But even if it were in effect through 1990, Ventura asserts, the Booking Agreement nevertheless did not govern his services as a commentator and announcer.

Whether the Booking Agreement continued in effect beyond 1987 is a question of fact. Neither party has served the other with the requisite written termination notice. The parties to a contract may, however, rescind it by mutual consent. *See Berg v. Ackman*, 431 N.W.2d 264, 266 (Minn. App. 1988). Whether the parties' conduct in this case amounts to consent to terminate is for the trier of fact, and there is evidence in this case from which a rational jury could find such consent. Therefore, the court declines to determine whether the Booking Agreement remained in effect beyond 1987.

Titan's motion also raises the issue of whether the Booking Agreement governs Ventura's services as a commentator and announcer. The Court concludes that it does not. The Agreement described Ventura as "a professional wrestler" seeking to have Titan arrange events and represent him in commercially exploiting his name, likeness, and personality. Booking Agreement, 2d "whereas" clause. The first right the Agreement granted Titan was to book Ventura at wrestling events, matches, and appearances in which Ventura "performs services as a professional wrestler." *Id.* § 1. The phrase "professional wrestler" unambiguously denotes one who wrestles for money. Titan does not suggest that this term had any

peculiar or special meaning in the context of the Booking Agreement.

After March 1986, Ventura did not wrestle at events booked by Titan. Rather, he announced and provided commentary on matches in which others wrestled. By its own terms, therefore, the Booking Agreement does not govern this announcing and commentary.

B. Ventura's Motions in Limine

1. To Preclude Reference to Fee Agreements as "Supplemental"

Ventura moves for an order precluding reference to the 1987 to 1990 commentary and announcing agreements as "supplemental" to the 1985 Wrestling Booking Agreement. Ventura claims that the commentary and announcing agreements were not supplemental to the 1985 Agreement because the latter did not govern his performance as a commentator and announcer.

As stated above in section A.11., whether the 1985 Booking Agreement remained in effect throughout the period during which Ventura was announcing and providing commentary is a question of fact for the jury. Ventura's motion, therefore, is denied.

2. To Preclude Paul Samulski From Testifying On Certain Matters

Ventura moves for an order precluding Paul Samulski, an officer or employee of LJN Toys, Ltd., from testifying because LJN did not identify Samulski as a

witness in response to Ventura's Rule 30(b)(6) notice of taking deposition.

Rule 30(b)(6) governs depositions of an officer or other person representing a corporation. If a party describes with particularity the subject matter of examination, the corporation must designate a person to testify on its behalf. Ventura served a Rule 30(b)(6) notice of taking deposition on LJN, describing in detail the subject of examination. LJN responded that none of its employees were competent to testify on matters within the scope of the notice.

Rules 37(b)(2)(B) and 37(d) permit a court to prohibit a party from introducing evidence described in a Rule 30(b)(6) deposition notice if the designated person refuses to appear for the deposition.

Because LJN stated that no one was competent to testify on matters within the scope of Ventura's notice of taking deposition, Samulski is prohibited from testifying on matters within the scope of that notice.

3. To Preclude Linda McMahon From Testifying On Certain Matters

Ventura moves for an order precluding Linda E. McMahon, current president of Titan, from testifying as to dealings between Ventura and Titan other than the 1985 Wrestling Booking Agreement. McMahon apparently has knowledge of the agreements between Ventura and Titan beyond the Booking Agreement.

Ventura states that Titan's responses to his interrogatories identified McMahon as having knowledge of

Ventura's dealings with Titan only in regard to the Booking Agreement. Therefore, Ventura states, he did not depose her or conduct further discovery regarding her knowledge. Thus, permitting her to testify to matters other than the 1985 Booking Agreement, he argues, would be unfair.

Ventura's interrogatory number 6 asked Titan to identify "all persons having knowledge" of transactions between Ventura and Titan, and to identify "the nature and circumstances of each such person's involvement with or relationship to" the transactions. McMahon was one of four persons Titan listed. Titan's response described her as the person responsible for the negotiation and execution of the 1985 Booking Agreement.

Titan states that, although McMahon *had knowledge* of most or all of the dealings between Ventura and Titan, she was only directly involved in negotiating the Booking Agreement. Hence, Titan contends, its answer to the interrogatory was adequate because Ventura asked for a description only of the person's *involvement with or relationship to* the relevant transactions. The court agrees and, therefore, denies Ventura's motion.

4. To Preclude Robert Marella From Testifying On Certain Matters

Ventura moves for an order precluding Robert Marella from testifying to certain matters. According to Ventura's reply memorandum, however, there is no dispute. The motion, therefore, is denied.

5. To Preclude Margaux Levy From Testifying On Certain Matters

Ventura moves for an order precluding Titan employee Margaux Levy from testifying about contracts, agreements, or transactions between Titan and Ventura. The basis for the motion is Titan's failure to identify Levy as a person with such knowledge in response to Ventura's interrogatories numbers 5 and 6.

Titan contends that Levy, an in-house counsel for Titan, dealt with Ventura and his lawyers only on a *proposed* contract that was never executed. In the court's opinion, working on a proposed contract counts as "having knowledge of the contracts, agreements or transactions" between Ventura and Titan. Therefore, the court grants Ventura's motion.

6. To Preclude Arthur Morowitz From Testifying as an Expert on Certain Matters

Ventura moves for an order precluding A&H Video employee Arthur Morowitz from testifying as an expert on whether Ventura's announcing and commentary was a substantial factor in the sales of official World Wrestling Federation videotape sales. Ventura argues that Morowitz is not qualified as an expert on what motivates an individual to purchase a wrestling videotape.

Titan asserts that Morowitz is qualified as an expert by his involvement in videotape sales since 1978. Since 1984, Morowitz has been Chair of the Board of A&H, "specializing in the distribution and sales of sports and entertainment video cassettes."

This information is not, by itself, enough to permit the court to rule on whether Morowitz is qualified to offer an expert opinion on consumers' reasons for buying wrestling videos. Nor is the court, however, in a position to rule that Morowitz is not so qualified. Therefore, the court defers ruling on this motion.

7. To Preclude Employee, Officer, or Agent of Radio Station KFAN From Testifying On Certain Matters

Ventura moves for an order excluding testimony from any witness not identified on Titan's witness list, including any agent, officer, or employee of the radio station KFAN. Pursuant to the trial scheduling order and L.R. 39.1(b)(1)(C), Titan identified one of its witnesses as "KFAN" without specifying an individual. Because Titan did not identify a specific individual, Ventura contends, no witness from KFAN should be permitted to testify.

Titan contends, however, that Ventura has not been prejudiced. According to Titan, Ventura had a contract with KFAN to provide commentary on Vikings football games. Titan served a Rule 30(b)(6) subpoena seeking the relevant documents and requesting the identity of an individual who would testify on Ventura's contracts with KFAN. Titan says it still does not know who KFAN will produce for testimony, but argues that Ventura or his agent knows who he negotiated with at KFAN.

The court concludes that Ventura has not been prejudiced, and, therefore, denies the motion.

8. To Exclude Titan/A&H Video Exhibit 163

Ventura moves for an order excluding from evidence Titan/A&H exhibit 163. Titan's agreement to withdraw the exhibit moots the motion.

9. To Preclude Reference to Certain Defendants as "Innocent" or "Good Faith" Actors

Ventura moves for an order forbidding the defendants, their lawyers, and their witnesses from referring to LJN Toys, Putnam Publishing, Coliseum Video, and Columbia House as "innocent" or "good faith" actors. These defendants are licensees of Titan that produced and sold videotapes and other merchandise featuring Ventura's name, voice, or likeness. They contend they relied on Titan's representations that it had the authority to license Ventura's name and likeness.

This motion appears to be moot in light of the court's ruling in section A.4, that Ventura may not offer any argument or evidence solely relevant to a claim against A&H and Columbia House. It is the court's understanding that LJN Toys, Putnam Publishing, and Coliseum Video, like A&H and Columbia House, are licensees of Titan that did not negotiate directly with Ventura. Therefore, as the court concluded above, Ventura has not demonstrated that he has any claim against them.

10. To Exclude Deposition Testimony of Barry Bloom

Ventura moves for an order excluding the deposition testimony of his agent, Barry Bloom, from evidence unless Titan can show he is "unavailable" as a witness within the meaning of Fed. R. Evid. 804(a). The motion is moot as the parties agree on the meaning of, and that they will comply with, the Rules of Evidence.

11. To Preclude Reference to Ventura's Performances as "Works for Hire" or "Works Made for Hire"

Ventura moves for an order prohibiting reference to his performances as "works made for hire" or "works for hire." He contends that such a characterization would be misleading, confusing, and unfairly prejudicial.

Ventura argues that the term "work for hire" is peculiar to copyright law and therefore inapplicable in the context of this case. However, there is evidence that, on at least one occasion, the parties may have used the term "work for hire" to describe Ventura's performance as an announcer and commentator. The court sees no reason, therefore, why Titan should not be permitted to introduce evidence of how and why the parties used the term. The motion is denied.

Accordingly, the court:

1) **GRANTS** Titan's motions in limine 1) to exclude evidence of fraud claim (clerk's entry no. 109); 2) to exclude evidence related to misappropriation claim

(entry no. 111); and 4) to exclude evidence related to claims against A&H and Columbia House (entry no. 115);

2) **DENIES** Titan's motions in limine 3) to strike quantum meruit claim (entry no. 113); 8) to strike unjust enrichment claim (entry no. 70); 10) to exclude evidence barred by the statute of frauds (entry no. 74); and 11) to determine effective period of booking agreement (entry no. 76);

3) finds **MOOT** Titan's motions in limine 5) to exclude evidence of revenues or profits from videotape sales (entry no. 117); 6) to exclude evidence barred by statute of limitations (entry no. 119); and 7) to strike duress defense (entry no. 121);

4) **DEFERS** ruling on Titan's motion in limine 9) to exclude testimony of Gary Cappetta (entry no. 72);

5) **GRANTS** Ventura's motions in limine 2) to preclude testimony by Paul Samulski (entry no. 95); and 5) to preclude testimony by Margaux Levy (entry no. 95);

6) **DENIES** Ventura's motions in limine 1) to preclude reference to agreements as "supplemental" (entry no. 95); 3) to preclude testimony by Linda McMahon (entry no. 95); 4) to preclude testimony by Robert Marella (entry no. 95); 7) to preclude testimony by an employee of KFAN (entry no. 95); and 11) to preclude reference to agreements as "work for hire" (entry no. 95);

7) finds **MOOT** Ventura's motions in limine 8) to exclude exhibit no. 163 (entry no. 95); 9) to preclude reference to certain defendants as "innocent actors" (entry no. 95); and 10) to exclude deposition of Barry Bloom (entry no. 95); and

8) **DEFERS** ruling on Ventura's motion in limine 6) to exclude testimony of Arthur Morowitz (entry no. 95).

Dated: February 2 , 1994.

/s/ Paul A. Magnuson
Paul A. Magnuson
United States
District Court Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Jesse Ventura (d/b/a Jesse "The Body" Ventura, a/k/a James G. Janos), Plaintiff, v. Titan Sports, Inc. (d/b/a Titan Sports Enterprises, The World Wrestling Federation, and the WWF), a Delaware corporation; A&H Video Sales Representatives, Inc. (d/b/a Coliseum Video), a New York corporation; LJN Toys, Ltd., a New York corporation; Putnam Publishing Group and its division Perigee Books (n/k/a The Putnam Berkeley Group, Inc.), a New York corporation; and Columbia House, a foreign corporation, Defendants.	Civil No. 3-91-811 **ORDER** (Filed July 21, 1994)

Before the court are defendant Titan Sports Inc.'s motions for judgment as a matter of law and/or judgment on partial findings; Titan's alternative motions for a

new trial or, in the alternative, amendment of the judgment or remittitur; Titan's motion for denial of prejudgment interest; and plaintiff Jesse Ventura's motion for an award of prejudgment interest.

I. Motions for Judgment as a Matter of Law and/or Judgment on Partial Findings

The only claim remaining at the conclusion of the trial in this matter was Ventura's equitable claim for quantum meruit. As Titan contends, Ventura was not entitled to a jury trial on the quantum meruit claim. Moreover, Titan did not consent to a jury trial. Therefore, under Federal Rule of Civil Procedure 39, the jury in this matter acted only as an advisory jury, and the court must enter findings of fact and conclusions of law pursuant to Rule 52. Accordingly, the court makes the following findings of fact and conclusions of law.

James G. Janos wrestled professionally from 1975 to March, 1986. Janos adopted his present professional name, "Jesse 'The Body' Ventura," in 1978. Since 1978 Ventura has used the name "Jesse 'The Body' Ventura" in all of his public and professional activities. From 1975 until 1984, Ventura wrestled for a number of different promoters across the country.

In 1984, Ventura became associated with Titan's wrestling organization, known as the World Wrestling Federation (WWF). From 1985 through 1990 Ventura also appeared as an announcer/commentator for Titan. As the result of both live and televised appearances as a wrestler, ventura was well known throughout the United States prior to his association with Titan.

Professional wrestling, as promoted by the WWF and similar organizations, is a hybrid of sport and entertainment. The performers execute athletic and acrobatic maneuvers, but the outcomes of matches are predetermined by the promoters, and at least some of the wrestling moves in most matches are choreographed or otherwise simulated. There are no sanctioning or rule-making bodies or commissions analogous to those that regulate professional boxing.

Pre- and post-match televised interviews with the wrestlers are an integral part of the entertainment. During these interviews, the announcers and commentators interact with the wrestlers to create plots known as "angles." These angles usually involve pitting good versus evil, with the wrestlers involved playing a role as either good, the "Baby Face," or evil, the "Heel." Jessie "The Body" Ventura was a heel. Television viewers are invited to attend live matches featuring their favorite performers or pay a fee to watch cablecasts of the live events on a pay-per-view basis to learn the outcome of the angles. Television is the primary promotional tool for live wrestling events and it is the duty of the announcers and commentators to "hype" the events or otherwise sell the angles.

Prior to 1984, when Ventura became involved with Titan, none of the wrestling promotions in the United States engaged to any substantial extent in licensing the names and likenesses of wrestlers in conjunction with the sale of merchandise, other than some small scale in-arena sales of t-shirts and similar merchandise. Nor did any of the promoters engage to any substantial extent in marketing videotapes of matches for home entertainment use.

Titan has promoted professional wrestling matches since 1982. In 1984, Titan was approached by A&H Video Sales Representatives, Inc., doing business as Coliseum Video who thought home video sales could be a "good ancillary business" for Titan. In December 1984, Titan entered into a Licensing Agreement with Coliseum. Pursuant to the agreement, Coliseum had the exclusive right to market and sell videotapes of WWF performances for home entertainment use. Titan retained artistic and creative control over the final product.

In July 1984, Titan entered into a licensing agreement with LJN Toys, Ltd. for the manufacture of dolls bearing the likenesses of popular WWF wrestlers. This licensing agreement was the first attempt by Titan to enter into the merchandise licensing business on a large scale.

In November 1984, Titan expanded its merchandise licensing business by entering into an agreement with DIC Enterprises, Inc. DIC was a "master licensee" whose duty it was to seek out merchandise licensing opportunities for Titan.

Between 1985 and 1990, Titan had more than one hundred licensees manufacturing and selling a variety of WWF-related merchandise, and such licensing became a major source of Titan's revenue. Among its licensees were Microleague Sports Association and Putnam Publishing.

Titan represented in its contracts with Coliseum, LJN, and DIC that it owned the right to exploit the names, likenesses, and characters of all talent associated with the WWF. At the time Titan entered the agreements, however, virtually none of its performers were under written contract.

Prior to 1984, written contracts between wrestlers and promoters did not exist in the professional wrestling industry. Instead, the industry norm was the "handshake" deal. In general, the promoter would "book" a wrestler for a match or matches, then in the promoter's sole discretion, he or she would pay some portion of the receipts from the live event to the wrestler – after the fact. There was no bargaining between promoters and wrestlers and, prior to a match, the wrestler rarely, if ever, would know how much he was going to be paid. Wrestlers were not unionized, and received no medical, retirement, or other benefits from promoters. Promoters classified wrestlers for their own purposes as "independent contractors."

Consistent with the prevailing practices in the industry, prior to 1984 Ventura never signed a written contract with any of the wrestling promoters for which he appeared and performed.

Between 1983 and 1985, Titan expanded the WWF from a Northeast United States regional promotion to a national, and then international promotion. It did so initially by syndicating its television programs on a series of local TV stations; taking advantage of the new developments in cable television as a second outlet for its programs; and promoting live matches wherever its syndicated and cable television shows were seen. As part of the expansion process, Titan acquired wrestling and other on-air talent from its competitors.

Titan's national expansion was opposed by other promoters of professional wrestling. Titan's owner, Vincent K. McMahon, testified by deposition that he even

received death threats related to his expansion into other territories. Given these circumstances, it was reasonable for a wrestler to believe in 1983-1985 that a decision to become associated with the WWF could well be irreversible.

Immediately before he joined the WWF in 1984, Ventura was with the American Wrestling Association. In 1983 and 1984 Titan acquired some of the American Wrestling Association's more popular performers as part of its expansion process. McMahon asked Ventura to leave the AWA and come wrestle for the WWF in a telephone conversation which took place in the spring of 1984. During this conversation McMahon did not advise Ventura that he would have to sign a written contract as a condition of the right to perform. Ventura accepted McMahon's offer, understanding that he would appear and perform wherever the WWF booked him, and that he would be paid a portion of the live gate after the match in accord with established industry practice. There were no negotiated fees.

Ventura did not discuss merchandising rights, videotapes, or other exploitation of his name and likeness with McMahon or with any other representative of Titan. And, because such merchandising was not an established practice in the industry at that time, Ventura had no reason to inquire as to Titan's merchandising plans.

From the spring of 1984 through the fall of 1984, Ventura appeared and performed as a wrestler for the WWF both at live events and on the WWF's televised and cablecast programs. He did so without a written contract and he was compensated in accord with the existing

industry practice, as orally agreed. Titan classified Ventura as an "independent contractor."

In the fall of 1984, Ventura was diagnosed with pulmonary emboli and hospitalized. While he was convalescing, Titan paid him $1,000.00 per week during September, October, and November, 1984. Titan had no contractual obligation to pay Ventura when he was not wrestling, and the payments ceased in December 1984, although Ventura still had not returned to the ring.

Believing he might never be able to wrestle again, Ventura explored alternative careers. As part of this effort, he did an interview with rock performer Cyndi Lauper that aired on a Twin Cities television station. Upon seeing a tape of this broadcast, McMahon invited Ventura to return to the WWF and become the first "heel" color commentator in professional wrestling history. McMahon told Ventura he would be paid $1,000.00 per week for his announcing/commentating duties, apart from whatever he might be paid as a wrestler should he return to the ring. Ventura agreed, and did return to the WWF as a commentator. Later, in January 1985, Ventura also returned to the ring as a wrestler. He was again paid as a wrestler in accord with the existing industry practice.

At some point during 1985, Titan employee Bob Marella, professionally known as "Gorilla Monsoon," told Ventura that if he did not sign a "Wrestling Booking Agreement" he would not wrestle again for Titan. Ventura signed the Agreement, which was received in evidence as Joint Exhibit 50. The Agreement recites an effective date of January 1, 1985, although the actual date it was signed is not clear from the evidence.

From January 1985 through March 1986, Ventura performed both as a wrestler and as announcer/commentator for Titan. Ventura was paid as a commentator pursuant to his oral agreements with McMahon. He was paid as a wrestler under the terms of the Wrestling Booking Agreement, which provided that Titan could determine in its sole discretion, following the match in which Ventura appeared, what Ventura would be paid.

In March 1986, Ventura terminated his relationship with Titan to pursue a movie and acting career. During the spring and summer of 1986, Ventura appeared in two feature films, "Predator" and "Running Man." After the conclusion of his work on "Running Man" in the fall of 1986, Ventura returned to the WWF as a commentator for the second time. Again, he did so without a written contract and based solely upon an oral agreement with Vincent McMahon regarding fees. This time, however, Ventura was to be compensated on an appearance-by-appearance basis, as opposed to on a weekly or annual basis. Ventura was not asked to sign a written contract and there were no discussions of merchandising or other intellectual property rights. Ventura never wrestled again after he left the WWF in March of 1986.

As an announcer/commentator, Ventura co-hosted or appeared on Titan's programs, which were seen on the NBC TV Network, USA Cable Network, pay-per-view television, and in syndication, including such programs as "WWF Wrestling Challenger," "WWF Super Stars of Wrestling," "WWF Prime Time," "TNT," and "Saturday Night's Main Event."

From the time Ventura started working as an announcer/commentator for Titan in early 1985, until October 1987, there were no discussions of Titan's right to use, or Titan's obligation to pay for the use of, Ventura's name and likeness in conjunction with videotaped reproductions of his performances or other merchandising associated with his announcing/commentating. On the other hand, merchandising and similar rights with regard to Ventura's performance as a wrestler were governed by the January 1, 1985 Wrestling Booking Agreement.

Ventura performed as the color commentator for "Wrestlemania I" in March 1985. Wrestlemania I was Titan's first major pay-per-view event. Titan subsequently marketed the program on videotape for home entertainment use. Ventura received no residual payments or other compensation for Titan's use of his performance on home videotape.

Ventura was also the color commentator for Titan's next major pay-per-view event, "Wrestlemania II," which Ventura agreed to do before embarking on his movie career in March 1986. After his return, Ventura was the commentator for Wrestlemania III.

In the fall of 1987, Ventura hired professional talent agent Barry Bloom to negotiate with Titan on his behalf for any future services as a commentator. Bloom's first negotiations were with Titan's partner in the production of NBC's "Saturday Night's Main Event," Dick Ebersol, but the negotiations quickly broke down and the first Saturday Night's Main Event of the 1987-89 season aired without Ventura's participation.

The following week, Titan's Vice-President of Business Affairs, Dick Glover, contacted Bloom and advised him that, since Ventura would not be doing the commentary for Titan that TV season, Titan wanted to produce a "Best of Jesse Ventura" videotape. Glover also told Bloom that Ventura would receive a 50 percent royalty if Ventura agreed to the "Best of" videotape. Ventura declined the offer.

One week after Ventura declined Titan's "Best of" videotape offer, Glover again contacted Bloom. This time Glover asked Bloom what it would take to get Ventura back as a commentator. Bloom asked Glover whether Titan would pay royalties for the sale of videotapes of Ventura's performances other than the "Best of" tape that was earlier discussed. Glover said "No," explaining that it was Titan's policy to pay royalties only to talent "featured" in their own videotapes, such as the "Best of Roddy Piper."

Believing it too difficult to "break" Titan's policy, Bloom agreed with Glover that Ventura would perform as a commentator, but that he would not be entitled to royalties for videotapes of his performances unless he was "featured." Bloom and Glover did not discuss, and reached no agreement at that time with regard to, Titan's rights to sell merchandise incorporating Ventura's name and likeness in his role as a commentator.

Bloom and Glover ultimately agreed to performance fees for Ventura's commentating appearances during the 1987-88 broadcast season and, accordingly, Ventura returned to the WWF as a color commentator for the third time in the fall of 1987. Ventura and his agent both

understood at this time that Titan would produce and sell videotapes of Ventura's color commentary performances and that neither Ventura nor any other person appearing in the tapes other than featured performers would receive royalties for such sales. No part of Ventura's compensation was allocated for videotape sales.

Between 1987 and 1990, Glover and Bloom meet annually in person or by telephone to negotiate Ventura's performance fees for each broadcast season. Bloom and Glover also negotiated separately for special "appearances" from time to time. During each of the negotiations Bloom asked Glover whether Titan's policy regarding the payment of videotape royalties had changed. Each time he was asked, Glover reiterated that no talent received videotape royalties unless they were the "feature" performer on a videotape. Glover also informed Ventura directly of this policy.

Bloom and Ventura relied on Glover's statements of Titan's royalty policy, and understood that, by entering into fee agreements, they were waiving their right to royalties.

None of the negotiations between Glover and Bloom was reduced to writing except in confirmatory letters sent by Glover to Bloom. None of the confirmatory letters was signed by Ventura or Bloom, and none referred to the 1985 Wrestling Booking Agreement.

In a May 1990 meeting in Titan's offices between Ventura, Bloom, Glover, and McMahon, McMahon reiterated that Titan did not pay royalties on videotapes as a matter of policy. Again, at a 1990 follow-up meeting which took place at the Belage Hotel in Los Angeles,

Glover reiterated the "policy," and specifically told Bloom that Titan did not pay royalties to Hulk Hogan, and would not pay them to Jesse Ventura.

Ventura never signed a written contract granting Titan merchandising rights with regard to sales of products referring to or depicting him in his role as a color commentator. Instead, Bloom and Glover orally agreed that royalties for each merchandising item would be negotiated separately, in advance, as each item came up.

In a memorandum, dated June 18, 1990, from Glover to McMahon, Glover acknowledged that Titan had "*no* merchandise rights" with regard to Ventura. Similarly, by letter of February 2, 1990, from Titan's house counsel to Bloom, Titan acknowledged that it had no executed contract for Ventura's services.

Notwithstanding the lack of agreement, items such as a Microleague wrestling computer game featuring Ventura in its advertisements and incorporating his image and likeness as a commentator in the game itself, and Putnam calendars depicting Ventura in his "Predator" role and as an announcer/commentator for Titan, were licensed for production by Titan without Ventura's prior knowledge and without a negotiated royalty or other fee agreement. Ventura received no royalties for the Microleague computer game and received only minimal royalties for the 1987 and 1988 Putnam calendars.

Titan also licensed the production of LJN wrestling dolls, t-shirts, and trading cards bearing Ventura's name and likeness. Because the dolls depicted Ventura as a

wrestler, and were subject to the January 1, 1985 Wrestling Booking Agreement, Ventura is not entitled to any further compensation for these items.

In addition to his performances for Titan between 1985 and 1990, Ventura appeared in a number of motion pictures and on network and syndicated television programs. Ventura also appeared in TV commercials, was the subject of point-of-purchase display advertising for various products, and did radio commentary for the NFL's Tampa Bay Buccaneers and Minnesota Vikings. Ventura's last commentating appearance for Titan was August of 1990. Since 1992, Ventura has been the color commentator for Titan's major competitor, World Championship Wrestling (WCW), a division of Turner Broadcasting. In all of these professional activities, Ventura used and uses the name Jesse Ventura or Jesse "The Body" Ventura.

Pursuant to Ventura's 1992 contract with WCW, he is paid videotape royalties as a flat percentage of sales, regardless of the number of minutes he appears in each tape, and regardless of whether his voice alone, likeness alone, or a combination of both are used. Ventura is the only performer associated with WCW who has a contractual provision for the payment of videotape royalties. WCW Wrestling is a smaller promotion than Titan's WWF was in the latter half of the 1980s, and WCW does not promote the sales of videotapes to the extent Titan and Coliseum did.

During 1985 Titan paid videotape royalties to Hulk Hogan, Marvel Comics, Mr. T, and Cyndi Lauper for their appearances in "Wrestlemania I." These payments were inconsistent with Titan's stated policy because

"Wrestlemania I" was not a video featuring one particular performer in each match.

During 1986 Titan paid videotape royalties to Hulk Hogan, Marvel Comics and Mr. T for their appearances in "Wrestlemania II," and paid a five percent royalty to Hulk Hogan for his performance in "The Big Event." These payments were inconsistent with Titan's stated policy because neither "Wrestlemania II" nor "The Big Event" were videos featuring one performer in each match.

During 1987 Titan paid videotape royalties to Hulk Hogan and Marvel Comics for "Wrestlemania III." These payments were inconsistent with Titan's stated policy because "Wrestlemania III" was not a video featuring one performer in each match.

Between 1985 and 1987 the payment of videotape royalties to various individuals by Titan was kept confidential by Titan and was known only by McMahon, his wife, Linda McMahon, who was Titan's Vice-President, and by necessary accounting personnel.

During 1988, all fifty-four wrestlers appearing in "Survivor Series," all fifty-seven wrestlers appearing in "Wrestlemania IV," and all thirty-eight wrestlers appearing in "Summer Slam '88" were paid videotape royalties by Titan. These payments were inconsistent with Titan's stated policy because none of the three videotapes featured one performer in each match.

From December 1988 forward, all wrestlers appearing in videotapes of pay-per-view events produced by

Titan received royalties. These payments were inconsistent with Titan's stated policy because the videotapes of these pay-per-view events did not feature one performer in each match.

During 1985 and 1986, when Titan's form wrestling Agreements did not obligate it to pay videotape royalties, royalties were nonetheless selectively paid to various individuals. And, from 1987 to 1990, videotape royalties were paid to various individuals in the sole discretion of McMahon, regardless of which form contract any individual had signed.

In light of Titan's actual history of royalty payments, the court concludes that, from 1987 through 1990, Titan's representations to Ventura that its policy was to pay videotape royalties only to performers featured on a videotape was false. Moreover, the court concludes that, had Ventura and his agent known other performers received videotape royalties, contrary to Titan' [sic] statement of its policy, they would not have agreed to accept any deal which did not compensate Ventura for the videotape reproduction and sale of his performances.

Ventura's performances as a color commentator were reproduced on 90 videotapes that were produced by Titan and distributed and sold for home entertainment use by Titan's licensees, Coliseum Video and Columbia House, between May 1985 and the date of trial. Ventura was paid no royalties or other compensation for the inclusion of his work on such videotapes.

The total net revenue for the 90 videotapes on which Ventura appeared was $24,293,527.94 (Exhibits 276, 282,

365), plus $1,440,000.00 (Exhibit 338 and Sages' testimony) for a total of $25,733,527.30. (Exhibits 111, 149 and 142 were deleted from the calculation as "wrestling" tapes and tapes in which Ventura appeared both as a wrestler and as a commentator were considered to be commentating performances.)

Ventura's expert, Weston Anson, testified that Ventura had a cross-over appeal which extended from wrestling to the television and movie industries. Given that Titan chose Ventura to be its color commentator for "Wrestlemania I" in 1985 and continued to use Ventura in virtually all subsequent pay-per-view events as well as in its weekly television and cablecast programs (combined with Ventura's success in the movie and television industries, including product endorsements), Anson opined that Ventura's character, "Jesse 'The Body' Ventura," as a wrestler and separately as a color commentator, was a commercially licensable product. The Court finds this testimony to be credible.

Anson further testified that a reasonable, arm's-length royalty rate for Ventura's performances as sold on videotape, if negotiated in 1986, would have been between three and one-half and seven and one-half percent of total revenues, with a flat rate of five percent. He further testified that typically such deals are negotiated on a flat percentage basis, with the producer retaining the option of including the performer in a videotape for that rate, or not including him or her at all. Titan produced no credible evidence that five percent of total revenues is an unreasonable rate for the use of Ventura's performances on videotape, or that such rate would have been unobtainable by Ventura in 1986. The Court finds Anson's

testimony on this issue to be persuasive, and concludes that a flat rate of five percent of revenue would be a reasonable compensation for Ventura's services.

Because there was no evidence of the total revenues for the sales of videotapes on which Ventura appeared, Anson testified that a lesser figure based on the total net sales receipts could be used, but that this figure would be an understatement of the true royalty to which Ventura is entitled. In the absence of evidence regarding total revenue, the Court can only speculate and, therefore, must consider only the evidence offered with regard to net receipts. Net receipts are, by definition, lower than total revenue.

Anson opined that in an arm's-length transaction in 1986, Ventura could have negotiated for seven and one-half percent of wholesale sales for the Microleague computer game, and seven to ten percent of wholesale sales for the Putnam calendars (multiplied by one over the number of months Ventura appeared on each calendar, i.e. 1/12). Titan presented no credible evidence that these percentage royalty rates are unreasonable or that they were unobtainable in 1986. The Court finds Anson's testimony to be credible.

Royalty provisions in various Titan form contracts are not determinative of a reasonable royalty rate for Ventura, because the Titan contracts were not the product of any bargained-for negotiation and were offered only on a take-it-or-leave-it bases. In this regard, the Court credits Anson's testimony that Titan's royalty scheme of keeping 75 percent of royalty of receipts for itself, and

distributing the remaining twenty-five percent to the performers is not reflective of licensing industry norms.

Similarly, SAG, AFTRA, and other union-bargained agreements used in the television and motion picture industries do not establish a reasonable royalty rate for Ventura because they reflect only a floor for all actors. Defendant's expert, Joshua Wattles, admitted on cross-examination that: (a) Titan is not a signatory to any union-bargained agreement; (b) there is no specific SAG or AFTRA category to describe what Ventura does (he is not a "sport announcer"); (c) there is no union which represents wrestlers or other performers in the wrestling industry; and (d) the SAG and AFTRA agreements have exceptions for those who can negotiate better deals. Wattles further admitted that, within the wrestling industry, "Jesse Ventura" is at the top of the scale, whereas among actors he is somewhere in the middle. However, even as an actor in a non-wrestling-related role, Ventura has been able to negotiate for two and a half times union scale.

Relying on Anson's testimony, Ventura's expert accountant Steven Dennis opined that Ventura is owed $54,738.00 for sales of the Microleague computer game, based on a royalty rate of seven and one-half percent, and $3,892.00 for sales of the Putnam calendars, using a rate of seven percent, or $5,819.00 for the calendars using a rate of ten percent. The court accepts Dennis's mathematical calculations.

Dennis also opined that Ventura is owed $865,723.00 for sales of videotapes, based on a royalty rate of three and one-half percent, $1,236,747.00 for sales of videotapes, based on a royalty rate of five percent and

$1,855,121.00 for sales of videotapes, based on a royalty rate of seven and one-half percent. Again, the court accepts his calculations.

Ventura claims he is entitled to compensation in the form of a reasonable royalty for Titan's commercial exploitation of his name and likeness with regard to the sale of various videotapes in which he appeared, a Microleague computer game in which he was depicted, and two Putnam calendars in which his name and likeness were featured.

Ventura's only remaining cause of action is in quantum meruit, which is a claim for services rendered in the absence of a contract. *See Sharp v. Laubersheimer,* 347 N.W.2d 268, 271 (Minn. 1984).

Ventura's claims for additional compensation for the videotape exploitation of his "wrestling" performances, and for the merchandise exploitation of his name and likeness as a "wrestler" are governed by the January 1, 1985 Wrestling Booking Agreement. Accordingly, Ventura is not entitled to recovery in quantum meruit for any exploitation of his name and likeness as a "wrestler."

As the court has already ruled, the Wrestling Booking Agreement governs only Ventura's performances as a "wrestler," and has no relevance to his performances as an announcer/commentator. The Booking Agreement provides that it shall remain in effect for two years, and thereafter shall "automatically renew" for successive one year terms until either party notifies the other, in writing, of its intent to terminate the Agreement. (Joint Exhibit 50, Section 3). Ventura terminated his relationship with Titan as a "wrestler" in March of 1986. When he returned to

Titan later that same year, it was solely as an announcer/commentator. Moreover, upon his return to the WWF, Ventura negotiated up-front appearance fees for his commentating work, inconsistent with the method and manner of compensation described in the Wrestling Booking Agreement. In addition, and also contrary to the Wrestling Booking Agreement, Titan agreed that it would not "merchandise" Ventura without his prior consent. Titan never told Bloom that Ventura had signed a contract, and neither party to any negotiations for Ventura's services as a color commentator ever mentioned or referred to the existence of the Wrestling Booking Agreement. Titan did not try to enforce any of its rights under the Wrestling Booking Agreement until this lawsuit was commenced. Under these circumstances, the court finds that there is clear and convincing evidence that the Wrestling Booking Agreement was mutually abandoned and rescinded by the parties in March 1986. Thus, after March 1986, the Wrestling Booking Agreement had no effect.

Ventura's performances as a color commentator/announcer for Titan between 1985 and October 1987 were in the absence of any contractual agreement or understanding regarding the payment of royalties for videotapes or merchandise exploitation. Ventura is therefore entitled to recover in quantum meruit for such exploitation.

A contract is voidable where assent is induced by a fraudulent misrepresentation on which reliance is justified. *See Carpenter v. Vreeman*, 409 N.W.2d 258, 260-61 (Minn. App. 1987).

Ventura was justified in relying on Titan's fraudulent misrepresentations of its videotape royalty policy. As a direct and proximate result of Ventura's justifiable reliance on Titan's misrepresentations, he suffered damages. The measure of damages for Ventura's quantum meruit claims is set forth in *Restatement of Restitution*, Section 152, which provides that:

> Where a person is entitled to restitution from another because the other has obtained his services, or services to which he is entitled, by fraud, duress or undue influence, the measure of recovery for the benefit received by the other is the market value of such services irrespective of their benefit to the recipient.

Where the services were not obtained through fraud, duress or undue influence, the measure of damages is the reasonable value of the benefit conferred to defendant. *Tompkins v. Sandeen*, 67 N.W.2d 405 (Minn. 1954). Where a person performs services for another at the other's request, or without any agreement about compensation, the person may recover the reasonable value of his or her services on implied contract. *Sagl v. Hirt*, 52 N.W.2d 721 (Minn. 1952).

The sum of $801,333.06, as determined by the advisory jury, is supported by the evidence as a sum which will fairly and reasonably compensate Ventura for the videotape exploitation of his color commentating performances. This sum is within the range contemplated by the testimony of Ventura's experts, which the Court has found to be credible.

There is no contract which governs Titan's merchandising exploitation of Ventura as a color commentator.

Without Ventura's prior consent or knowledge, Titan licensed the production of a Microleague computer game featuring Ventura in its advertisements and incorporating his name and likeness as a color commentator into the game itself. Titan also licensed the production of 1987 and 1988 calendars featuring Ventura, respectively, in his "Predator" movie role and in his color commentating role for the WWF.

The sum of $8,625.60, as determined by the advisory jury, is supported by the evidence as a sum which will fairly and reasonably compensate Ventura for the sale of the Microleague computer game and the 1987 and 1988 calendars. This sum is within the range contemplated by the testimony of Ventura's experts, which the Court has found to be credible.

Titan also licensed the production and sale of a "Jesse 'The Body' Ventura" wrestling doll. However, the licensing of this "wrestler" doll, which occurred prior to March 1986, is controlled by the January 1, 1985 Wrestling Booking Agreement and Ventura is entitled to no quantum meruit recovery.

Titan's motions for judgment as a matter of law and/or judgment on partial findings are, therefore, denied.

II. Alternative Motions for a New Trial or, in the Alternative, Amendment of the Judgment or Remittitur

Titan moves alternatively for a new trial in the event that the court denies its motion for judgment as a matter of law. As the court is required to and in this order enters findings of fact and conclusions of law pursuant to Rule

52, the motion for a new trial is denied. Titan also moves for an amendment of the judgment or a remittitur. These motions too are denied in light of the findings of fact and conclusions of law.

III. Prejudgment Interest Motions

A. Ventura's Entitlement to Prejudgment Interest

Titan moves for a denial of prejudgment interest and Ventura responds with a motion for prejudgment interest. Minnesota Statutes section 549.09 subd. 1(b) (1993) provides that "Except as otherwise provided by contract or allowed by law, preverdict . . . interest on pecuniary damages shall be computed as provided in clause (c) from the time of the commencement of the action . . . except as provided herein." The parties agree that none of the exceptions provided in section 549.09 applies.

The parties disagree, however, about the interaction between section 549.09 and the common law prejudgment interest standard. The disagreement stems from the fact that section 549.09 provides when and how prejudgment interest will be awarded "Except as otherwise . . . allowed by law." By appending this phrase, the drafters of section 549.09 undoubtedly intended to indicate that the provision does not entirely preempt common law. The statute, does not, however, make clear what part of the common law survives.

According to Ventura, the drafters intended that prejudgment interest awards under section 549.09 be entirely in addition to those permitted by common law. Thus, Ventura would have the court award him the interest

available under the literal terms of section 549.09, then add to that award any amount that common law would have permitted. The court will refer to this as the "additive view." Titan takes the opposite view, arguing that Ventura is entitled only to that amount of prejudgment interest that both section 549.09 and the common law permit. Under Titan's view, therefore, Ventura is not entitled to any interest that would be permitted only by either section 549.09 or by common law, but not by both. This theory the court will refer to as the "subtractive view."

In dispute in this case are two differences between the common law prejudgment interest standard and section 549.09. First, the common law was more generous to plaintiffs than the statute in that it permitted prejudgment interest to accrue from when the claim arose, not merely from when the action commenced. However, the common law was less generous in that, unlike the statute, it permitted prejudgment interest only where the damages claim was liquidated or readily ascertainable by computation and not dependent upon contingencies or jury discretion. *See Summit Court, Inc. v. Northern States Power Co.*, 354 N.W.2d 13, 16 (Minn. 1984).

Under the additive interpretation of section 549.09, if Ventura's claim was liquidated or readily ascertainable and not dependent on contingencies or jury discretion, he would, pursuant to the common law, be entitled to interest on his judgment from the date the cause of action arose through the date the lawsuit commenced. And, regardless of whether his claim was liquidated or readily

ascertainable, Ventura would be entitled, pursuant to section 549.09, to interest for the period from commencement through judgment.

Under the subtractive view, on the other hand, Ventura would be entitled to prejudgment interest only for the period from commencement through judgment, and only if his claim were liquidated or readily ascertainable.

There is some confusion in the caselaw [sic] as to whether the additive view, the subtractive view, or some other view, is the correct interpretation of section 549.09's qualification that it governs awards of prejudgment interest "except as otherwise allowed by law." Although many Court of Appeals and several Supreme Court decisions have dealt with awards of interest under section 549.09, none has articulated an overarching principle regarding the relationship between the common law and section 549.09.

The clearest ruling applies to the liquidation requirement for the period from commencement to judgment. According to *Leinhard v. State*, 431 N.W.2d 861, 865 (Minn. 1988), the additive view is correct with regard to this period and this issue. The *Leinhard* Court explained that one of the aims of the Legislature when it amended section 549.09 in 1984 was to "allow pre-verdict interest irrespective of a defendant's ability to ascertain the amount of damages for which he might be held liable." *Id.* In support of this conclusion, the Court cited legislative history indicating that one of three purposes of the 1984 amendment was to compensate plaintiffs more fully. *Id.* (citing *Hearings on H.F. No. 559 Before the Law Reform Subcomm. of the House Comm. on the Judiciary*, 73rd Leg.,

1st Sess. (Apr. 13, 1983) (remarks on audio tape of bill author Rep. Schoenfeld)).

Despite the *Leinhard* ruling, however, several subsequent decisions by the Court of Appeals have taken the subtractive view on this issue, requiring plaintiffs to demonstrate that their claims were liquidated or readily ascertainable before permitting interest for the period from commencement through judgment. *See. e.g., International Financial Services, Inc. v. Franz,* 515 N.W.2d 379, 389 (Minn. App. 1994); *Dear v. Minneapolis Fire Dept. Relief Assoc.,* 481 N.W.2d 69, 73 (Minn. App. 1992) (citing a pre-amendment Supreme Court decision); *ZumBerge v. Northern States Power Co.,* 481 N.W.2d 103, 109 (Minn. App. 1992) (citing pre-amendment District of Minnesota decision). These decisions are inconsistent with the controlling precedent in *Leinhard.* Consistently with *Leinhard,* however, other Court of Appeals decisions have interpreted section 549.09 to have abrogated the liquidated/readily ascertainable requirement for the period from commencement to judgment. *See Casey v. State Farm Mutual Automobile Ins. Co.,* 464 N.W.2d 736, 739 (Minn. App. 1991); *Solid Gold Realty, Inc. v. Mondry,* 399 N.W.2d 681, 683-84 (Minn. App. 1987).

The Supreme Court has not ruled on whether the common law entitlement to precommencement interest continues to be available under the current section 549.09. And, to this court's knowledge, only one Court of Appeals decision has squarely addressed this issue. In *Solid Gold,* the Court of Appeals affirmed an award of interest under the common law liquidated/readily ascertainable standard for the period from the date the claim arose to the date the action commenced, and without

regard to liquidation or ascertainability for the period from commencement to judgment. 399 N.W.2d at 683-84.

The position that precommencement interest remains available under the common law standard is supported by another Court of Appeals decision. Although it was not faced with the issue of precommencement interest, the court in *Seaway Port Auth. of Duluth v. Midland Ins. Co.* explained that section 549.09 "was not intended to disturb the existing law of prejudgment interest, but to provide, for prejudgment interest in situations where prejudgment interest was not already allowed by law." 430 N.W.2d 242, 252 (Minn. App. 1988), *aff'd as modified*, 485 N.W.2d 145 (Minn. 1992) (mem.). The Eighth Circuit Court of Appeals recently relied on *Seaway* for the position that section 549.09 "was intended solely to allow interest in situations where interest was not already allowed by law." *Northwest Airlines, Inc. v. Flight Trails*, 3 F.3d 292, 297-98 (8th Cir. 1993).

Titan cites several opinions for the proposition that section 549.09 precludes an award of precommencement interest. *See, e.g., Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 841 (Minn. 1988), *cert. denied*, 492 U.S. 926 (1989); *Metalmasters of Minneapolis v. Liberty Mutual Ins. Co.*, 461 N.W.2d 496, 502 (Minn. App. 1990). These opinions are inapposite because none alludes to a request for, or even the possibility of, precommencement interest. Rather, each of these opinions merely states that, *under section 549.09*, preverdict interest begins from the commencement of the action.

This court concludes that the Minnesota Supreme [sic] would agree with the holding of *Solid Gold* and with

the analysis of *Seaway* because it would adopt the additive view of the relationship between the common law of prejudgment interest and section 549.09. First, the additive view is a better interpretation of the plain meaning of the phrase "Except as otherwise . . . allowed by law, preverdict . . . interest . . . shall be computed as provided [below]." Had the Legislature intended the subtractive view, it would have better achieved its goal by providing that prejudgment interest would be available as provided by section 549.09 "except as otherwise *disallowed* by law. . . . " Second, as the Minnesota Supreme Court has stated, one of the purposes of the current form of section 549.09 was to compensate plaintiffs more fully. The additive view obviously does this better than the subtractive view. Ventura, therefore, is entitled to interest on his judgment for the period from when his cause of action arose to the time he commenced this lawsuit if his claimed damages were liquidated or readily ascertainable and not contingent or dependent upon jury discretion. Ventura also is entitled to interest from the time of commencement to judgment under section 549.09 regardless of whether his claim is liquidated or readily ascertainable.

B. Precommencement Interest

Under Minnesota common law, a prevailing party is entitled to interest on its judgment only if its damages claim was liquidated, "or, if unliquidated, 'where the damages were readily ascertainable by computation or reference to generally recognized standards such as market value and not where the amount of damages depended upon contingencies or upon jury discretion (as

in actions for personal injury or injury to reputation).' " *Summit Court, Inc. v. Northern States Power Co.*, 354 N.W.2d 13, 16 (Minn. 1984) (quoting *Potter v. Hartzell Propeller, Inc.*, 189 N.W.2d 499, 504 (Minn. 1971)). A mere difference of opinion about the amount of damages is immaterial; the issue is whether the debtor could have determined its potential liability from a generally recognized objective standard of measurement. *Pearson-Berke, Inc. v. McIntosh*, 350 N.W.2d 378, 379 (Minn. 1984); *ICC Leasing Corp. v. Midwestern Machinery Co.*, 257 N.W.2d 551, 557 (Minn. 1977).

Ventura argues that Titan could readily have ascertained the amount of his damages because it knew when the videotapes and merchandise were sold and was a sophisticated licensor who knew what royalty rate Ventura could have expected or negotiated for. The discretion the jury exercised, according to Ventura, involved a narrow range of percentages, not a contingency such as lost profits from a new business or product.

Titan, on the other hand, contends that, because Ventura's claim that ranged from $800,000 to nearly $2,000,000, it was not readily ascertainable and the jury's discretion accordingly was broad. In support, Titan cites *Hogs Unlimited v. Farm Bureau Mutual Ins. Co.*, 401 N.W.2d 381, 388 (Minn. 1987). In *Hogs*, the plaintiffs arrived at a value for their partnership by hiring an expert to scrutinize the partnership's business records and the quality and nature of the partnership assets. *Id.* at 388. The estimates ranged from $218,500 to $428,250. *Id.* The *Hogs* court held that the number of variables the expert considered together with the $200,000 variation made the damages claim not readily ascertainable. *Id.*

Ventura's claim for damages is based on expert opinions about the royalty rate Ventura likely would have obtained through negotiation. Because the range in values that Ventura requested was over $1,000,000, or more than 100 percent of the low end of the range, the court concludes that under the *Hogs* standard Ventura's claim was not readily ascertainable. Ventura is not entitled, therefore, to interest on his judgment for the period from when his claim arose to the date of commencement of this action.

C. Postcommencement, Prejudgment Interest

As stated above, section 549.09 entitles Ventura to interest on his judgment regardless of whether it is liquidated or readily ascertainable. Ventura requests $85,568.20 in interest for the period from commencement to April 21, 1994, the date of the original judgment in this action. Ventura requests an additional $66.57 per day for the period from April 21, 1994 through the date judgment is amended. These amounts were calculated by applying the rate specified under section 549.09 to the entire amount of the judgment. Although Titan argues that Ventura is entitled to no prejudgment interest at all under the common law liquidated/ascertainable standard, it does not dispute Ventura's calculation under section 549.09. As the court is aware of no reason to deny Ventura's request, it concludes that he is entitled to prejudgment interest of $85,568.20 plus $66.57 per day from April 21, 1994 through the date this order is filed.

Accordingly, the court **ORDERS** that:

1) the judgment on the basis of the jury verdict entered April 18,,1994 (clerk's entry no. 165), the order for judgment on the basis of the jury verdict entered April 21, 1994 (entry no. 176), and the judgment on the basis of the decision of the court entered April 21, 1994 (entry no. 177) are **VACATED** except to the extent that the claims against defendants A&H Video Sales Representatives, Inc.; LJN Toys, Ltd.; Putnam Publishing Group and its division Perigee Books; and Columbia House are dismissed with prejudice in accord with the court's ruling from the bench during trial;

2) Titan's motions for judgment as a matter of law and/or judgment on partial findings (entry nos. 180 & 187), and for a new trial or, in the alternative, amendment of the judgment or remittitur (entry nos. 179 & 185) are **DENIED** except to the extent that the court vacates the judgments and order for judgment entered on the basis of the jury verdict;

3) **JUDGMENT BE ENTERED** on the basis of the above findings of fact and conclusions of law in favor of Ventura and against Titan in the amount of $809,958.66;

4) Titan's motion to deny prejudgment interest (entry no. 167) is **DENIED**;

5) Ventura's motion to amend the judgment to include prejudgment interest (entry no. 178) is **GRANTED** in the amount of $85,568.20 plus $66.57 per day from April 21, 1994 through the date this order is entered.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: July 21, 1994

/s/ Paul A. Magnuson
PAUL A. MAGNUSON,
Judge
United States
District Court

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 94-3103MNST
No. 94-3235MNST

Jesse Ventura, Appellee, vs. Tital [sic] Sports, Inc., Appellant.	* * * * * *	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 26, 1995

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Jesse Ventura (d/b/a Jesse "The Body" Ventura, a/k/a James G. Janos),

Plaintiff,

v.

Titan Sports, Inc. (d/b/a Titan Sports Enterprises, The World Wresting Federation, and the WWF), a Delaware corporation; A&H Video Sales Representatives, Inc. (d/b/a Coliseum Video), a New York corporation; LJN Toys, Ltd., a New York corporation; Topps Chewing Gum, Inc., a New York corporation; Putnam Publishing Group and its division Perigee Books (n/k/a The Putnam Berkeley Group, Inc.), a New York corporation; and Columbia House, a foreign corporation,

Defendants.

Civil File No. 3-91-811

ORDER

(Filed Mar. 4, 1994)

Plaintiff Jesse Ventura moves for reconsideration of that portion of the February 2, 1994 Order that precludes him from offering argument or evidence at trial as to his claim of appropriation of name and likeness. Ventura

contends that the court wrongly concluded that Minnesota does not recognize a cause of action for appropriation of name and likeness. The court's conclusion that Minnesota has not recognized a cause of action for appropriation of name and likeness remains unswayed.

The Minnesota Supreme Court, quoting Prosser, has recognized that the common law tort of "invasion of privacy" subsumes four separate torts. *Hendry v. Connor,* 226 N.W.2d 921, 922 (Minn. 1975). One of these is the tort of "appropriation for the defendant's benefit or advantages of the plaintiff's name or likeness." *Id.* The court then explained that Minnesota has never recognized a cause of action for invasion of privacy. *Id.* at 923.

Since *Hendry,* Minnesota courts have repeatedly refused to recognize invasion of privacy as a cause of action. *See Stubbs v. North Memorial Medical Center,* 448 N.W.2d 78, 79 (Minn. App. 1989) ("The long established rule in Minnesota is that invasion of privacy is not recognized as a cause of action."). Moreover, federal district courts refusing to recognize a cause of action for invasion of privacy under Minnesota law have been upheld on appeal. *See Price v. Viking Press, Inc.,* 625 F. Supp. 641, 651 (D. Minn. 1985), *aff'd,* 881 F.2d 1426 (8th Cir. 1989); *Ruzicka v. Conde Nast Publications, Inc.,* 939 F.2d 578, 583 n.8 (8th Cir. 1991).

The two federal opinions on which Ventura relies, *Uhlaender v. Henricksen,* 316 F. Supp. 1277, 1281-83 (D. Minn. 1970), and *McFarland v. E&K Corporation,* 18 U.S.P.Q.2d 1246 (D. Minn. 1991) do appear at first glance to lend some support to his position. Neither opinion, however, cites to or relies on Minnesota law regarding

appropriation of name and likeness. Moreover, *Uhlaender*, decided in 1970, predates a string of state and federal opinions that state there is no cause of action for invasion of privacy in Minnesota. On the other hand, *McFarland*, although recent, does not address whether a cause of action for appropriation of name and likeness exists in Minnesota. Rather, it cites *Uhlaender* and a federal opinion interpreting New York law for the proposition that an individual's interest in the commercial exploitation of his or her name, identity, or likeness is known as the "right of publicity." *McFarland*, 18 U.S.P.Q.2d at 1247. Then, without stating whether Minnesota recognizes such a cause of action, the opinion turns to the issue of whether George McFarland, who played the character "Spanky" on the television show "Little Rascals," has an interest in that name. *Id.* at 1247-48.

The Plaintiff cites no Minnesota state court case which explicitly recognized a cause of action for appropriation of name and likeness. The Minnesota Supreme Court has not spoken directly on this question, and the single reported Minnesota state case addressing the issue cited a federal case which predated the Minnesota Supreme Court's refusal to recognize a tort of privacy. *See C.L. House v. Sports Films & Talents*, 352 N.W.2d 684, 685 (Minn. Ct. App. 1984). Moreover, the brief reference in that case to appropriation is essentially dictum: because the plaintiffs were not celebrities, they could not satisfy a necessary precondition for an appropriation claim. *Id.* Therefore, the Minnesota Court of Appeals did not need to discuss whether Minnesota state courts would recognize such a claim and whether *Uhlaender* accurately predicted Minnesota state law. Neither Minnesota state

courts nor its legislature has recognized an "appropriation of name and likeness" tort. There is little evidence in reported Minnesota cases to suggest that Minnesota would recognize the tort. Accordingly, the Court concludes it is not appropriate or consistent with the Court's function in a diversity case to create such a state law tort.

Even if Minnesota did recognize a cause of action for appropriation, however, Ventura's consent to Titan's commercial exploitation of his name and likeness would thwart such a claim. Consent to the commercial exploitation of one's name and likeness precludes a claim of misappropriation. *House v. Sports Films & Talents, Inc.*, 351 N.W.2d 684, 685 (Minn. App. 1984). Ventura knew Titan would exploit his voice and likeness during the broadcasts of the events themselves. *See* Plaintiff's Second Amended Complaint ¶ 44. Moreover, he concedes that he knew Titan would sell videotapes containing his voice and likeness when he contends that Titan fraudulently failed to inform him that other performers who, like he, were not featured wrestlers, would receive royalties from the videotape sales. *See* Plaintiff's Memorandum in Opposition to Motions in Limine (clerk's entry number 103) at 5-6.

The fraud Ventura alleges does not vitiate his consent. "[C]onsent to conduct of another is effective for all consequences of the conduct and for the invasion of any interests resulting from it" unless the consent is induced by "a substantial mistake concerning the nature of the invasion of his interests or the extent of the harm to be expected from it." Restatement (Second) of Torts Section

892B(1) & (2) (1977). The essence of Ventura's fraud allegation is that Titan misled him into thinking his bargaining position was weaker than it actually was. This alleged misrepresentation did not enlarge the scope of Ventura's consent to the commercial exploitation because he consented to precisely what Titan did. His only complaint is that he was not paid as much as he might have been. The motion for reconsideration is, therefore, denied.

The Court also finds it appropriate to amend its February 2, 1994 ruling on Titan's motion to exclude testimony of Gary Cappetta. The Court deferred ruling on that motion until it knew the context in which Cappetta's testimony would be offered. After review, the Court determines that the better resolution is to deny Titan's motion as not ripe for determination. The denial shall be without prejudice and Titan may renew the motion if it becomes ripe for determination.

Accordingly, **IT IS HEREBY ORDERED THAT:**

1. Plaintiff's motion for Reconsideration (Clerk Doc. No. 124) is DENIED; and

2. Defendant Titan's motion to exclude the testimony of Gary Cappetta (Clerk Doc. No. 72 is DENIED WITHOUT PREJUDICE.

Dated: March 3, 1994.

/s/ Paul A. Magnuson
Paul A. Magnuson
United States District
Court Judge

APPENDIX F

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-3103
Cross Appeal No. 94-3235

Jesse Ventura, d/b/a Jesse
"The Body" Ventura, a/k/a
James G. Janos,

Appellee/Cross Appellant,

-vs-

Titan Sports, Inc., d/b/a
Titan Sports Enterprises, d/b/a
The World Wrestling Federation,
d/b/a The WWF, a Delaware
Corporation,

Appellant/Cross Appelle. [sic]

On Appeal From the United States

District Court for the District of Minnesota

The Honorable Paul A. Magnuson, Judge.

Tape recorded 3/16/95

Transcribed by Dennis R. Currier

Court Reporter, 3/18/95

AFFILIATED COURT REPORTERS
741 MIDLAND BANK BLDG. MPLS., MN
(612) 338-4348

APPEARANCES

This transcript is a copy of a tape forwarded to me by Mark Ginder, indicating on its face: Ventura v. Titan, 3/16/95, Case #94-3103/3235, Judicial Officer M. Anderson; Certified By Operator to be True and Correct, Signed FJM, JRG, MSA.

JUDGES: FRANK J . MAGILL
MORRIS S. ARNOLD
JOHN R. GIBSON

Jerry S. McDevitt, Esquire, Attorney at Law, of the law firm of KIRKPATRICK & LOCKHART, 1500 Oliver Building, Pittsburgh, PA 15222, appeared for and on behalf of Appellant/Cross-Appellee, Titan Sports, Inc.

Mark Ginder, Esquire, Attorney at Law of the law firm of DORSEY & WHITNEY Pillsbury Center South 220 South Sixth Street, Minneapolis, Minnesota 55402, appeared for and on behalf of Appellant/Cross-Appelle, [sic] Titan Sports, Inc.

Alan C. Eidsness, Esquire, Attorney at Law, of the law firm of HENSON & EFRON, 1200 Title Insurance Building, Minneapolis, Minnesota 55401, appeared for and on behalf of the Appellee/Cross Appellant, Jesse Ventura.

[p. 3] MR. McDEVITT: Good morning, Your Honors. If it please the court my name is Jerry McDevitt. I'm here today to present the argument on behalf of Titan Sports for reversal of the lower court's award of an amount in excess of $800,000 to Jessie Ventura.

THE COURT: Why isn't there a Section 301 express exemption under the Copyright Act in this case of the state law claims?

MR. McDEVITT: There may well be, Your Honor, if Mr. Ventura had pursued any intellectual property claims, which he didn't, that may well have been an argument. Mr. Ventura has never brought an intellectual property claim in this case except for one claim, the so-called right of publicity claim, which was dismissed prior to the trial and not appealed in the law of this case, as I understand it, because there is no intellectual property claim before this court despite what you might think from reading the briefs.

The only claim that was tried, according to the court's own opinion, was a claim for services rendered supposedly in the absence of a contract. A services claim only. [p. 4] And the record very clearly below shows, in fact it's uncontested as far as I can tell on the appeal, no service that Jessie Ventura ever rendered as a color commentator for Titan Sports was in the absence of a contract. Every service he ever rendered was pursuant to a contract. And every contract he ever made was completely honored by my client.

And that is the fundamental flaw with this whole case.

THE COURT: The fraud count has been knocked off?

MR. McDEVITT: Specifically, Your Honor, what happened with the fraud claim was in response to Limine motions the court by an order dated I believe February the 2nd constrained Mr. Ventura's fraud claim to the fraud claim that he had pled, which was a markedly different fraud claim than the fraud claim that was advanced at trial.

He didn't, as Mr. Ventura stated in his brief, dismiss the fraud claim in pretrial rulings. He said you're allowed to pursue your fraud claim. But, it's the fraud claim he pled, no other fraud claim.

[p. 5] On the day of jury selection after the jury was selected Mr. Eidsness voluntarily dropped the pled fraud claim because he couldn't prove that fraud claim. It had been thoroughly disproven in the pretrial proceedings. He dropped the fraud claim. And in one of the rulings that the court made, that I submit was error, we weren't even allowed in the opening statements or in cross-examination to demonstrate that the state of mind that Jessie Ventura was claiming at the trial was markedly at odds with the state of mind that was reflected in his original fraud claim in pretrial proceedings. Totally restricted from impeaching his claim of his state of mind at the time of trial by his prior inconsistent statements of what his claim of fraud was.

But, Your Honor's point is well taken. I think there are – this had been framed below as an intellectual property claim, which it was not. There were a variety of defenses to this claim that would have been asserted.

THE COURT: But, doesn't this fit within Baltimore Oriole?

[p. 6] MR. McDEVITT: My view I think it would, Judge, if it had been pled as a copyright claim. But, again, he avoided that because I think he knows.

THE COURT: I guess our problem is we have to take the case we find.

MR. McDEVITT: And he didn't make a trademark claim, a copyright claim or any known intellectual property claim below. And he's trying to sustain his verdict by the intellectual property concepts in his brief, clearly he is, at every relevant time he is.

Your Honor, if you look very clearly below the court's opinion, page 19, states the only claim that was tried in this case was supposedly Quantum Meruit for services rendered in the absence of a contract.

THE COURT: Well, that's clear. Our problem is that all of that other stuff came in the back door as part of the Quantum Meruit proof.

MR. McDEVITT: Your Honor, everything came in the back door in this case.

* * *

[p. 29] THE COURT: So what your opponent said is wrong, namely that this is the property of the producer and they can reproduce it and not pay anybody.

MR. EIDSNESS: Well –

THE COURT: Why is that wrong?

MR. EIDSNESS: Why that's wrong, Your Honor, Judge Arnold, is that this is the services that Mr. Ventura is providing. He's [p. 30] providing these services and he has a right to decide whether he wants his services to be reproduced on video tape for somebody else's rights.

THE COURT: I understand that's your theory. But, the problem that I have with it is it's simply an assertion. Show me a case that says, well, if nobody says anything about royalties, nobody is entitled to royalties, or, a case that says if no one says anything about royalties then you're entitled to Quantum Meruit. Where is the case?

MR. EIDSNESS: Your Honor, I believe that I could clearly state that is a case of first impression. There is no case that says it is and there is no case that says it isn't.

THE COURT: Oh, great.

APPENDIX G

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

Jesse Ventura,
dba Jesse "The Body" Ventura,
aka James G. Janos,

Plaintiff,

Civil 3-91-811

v.

Titan Sports, Inc., et al,

Defendants.

The above-entitled matter came on for Trial before the Honorable Paul A. Magnuson, a Judge of the above-named Court, and a Jury, on Monday, March 21, 1994, at St. Paul, Minnesota commencing at 9:45 a.m.

The following is a transcript containing the proceedings had on Wednesday, March 23, 1994, commencing at 10:05 a.m.

BRUCE R. TIFFANY
UNITED STATES COURT REPORTER
GLENN H. ANDERSON
ANDERSON AND ASSOCIATES
646 Federal Building
316 North Robert Street
St. Paul, Minnesota 55101

612 291-7835

J. VENTURA-CROSS

* * *

[p. 109] Q Well, were you aware that Titan Sports intended to put out such video cassettes when you received the various booking agreements which were handed to you to be signed in 1985?

A No.

Q You didn't read any of the provisions in the booking agreements that had to do with video cassette distribution?

A No, I did not. No.

Q Did you become aware that Titan Sports was putting out video cassettes with its various wrestling events in the summer of 1985 when you were doing the lead-ins and lead-outs for Coliseum Video?

A Yes.

Q And just for the sake of the members of the Jury, what is a lead-in or a lead-out?

A A lead-in or lead-out is an introduction to the match and a lead-out would be at the conclusion of the match, responding to whatever had happened or whatever. You're not directly –

A lead-in or lead-out means you did not directly broadcast the match itself, but that you were in that gap space in between that match and the next one.

Q And I believe on one of the video cassettes that [p. 110] you identified and described this morning, you indicated that you were the host on the video cassette, right?

A Yes.

Q And that meant your were doing lead-ins and lead-outs, right?

A Yes.

Q And those lead-ins and lead-outs were prepared by Coliseum Video were they not?

A Yes.

Q And at the time you were doing those lead-ins and lead-outs you knew that you were doing them for video tapes that were going to be sold to the public at large, did you not?

A I knew I was doing them and I guess I would presume they would be sold, rented or whatever. Video tapes were all relatively new, then. I new I was doing lead-ins and lead-outs for video tapes, yes.

Q And subsequently do you recall that when you and Vince McMahon were commentating on the Superstars program, one of Titan Sport's syndicated television programs, that you and Vince McMahon were advertising the video cassettes of the pay-per-view events?

A I would say Vince McMahon did more of the advertising of video cassettes to the pay per view.

* * *

APPENDIX H

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

* * *

§ 301. Preemption with respect to other laws

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a

tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to –

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978;

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106; or

(4) State and local landmarks, historic preservation, zoning, or building codes, relating to architectural works protected under section 102(a)(8).

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2047. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action

arising from undertakings commenced on and after February 15, 2047. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2047.

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

(e) The scope of Federal preemption under this section is not affected by the adherence of the United States to the Berne Convention or the satisfaction of obligations of the United States thereunder.

(f)(1) On or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, all legal or equitable rights that are equivalent to any of the rights conferred by section 106A with respect to works of visual art to which the rights conferred by section 106A apply are governed exclusively by section 106A and section 113(d) and the provisions of this title relating to such sections. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State.

(2) Nothing in paragraph (1) annuls or limits any rights or remedies under the common law or statutes of any State with respect to –

> **(A)** any cause of action from undertakings commenced before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990;
>
> **(B)** activities violating legal or equitable rights that are not equivalent to any of the rights

conferred by section 106A with respect to works of visual art; or

(C) activities violating legal or equitable rights which extend beyond the life of the author.